No. _____

Supreme Court, U.S.
FILED

(1)

In The 98 421 SEP 8 1998

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Supreme Court of The United States

October Term, 1997

ROBERT L. SCHULZ and JOHN SALVADOR, JR.

Petitioners,

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and MICHAEL FINNEGAN, CHIEF COUNSEL TO THE GOVERNOR, and GARY SHEFFER, SPOKESMAN FOR THE GOVERNOR; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, MAJORITY LEADER OF THE SENATE; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, CHIEF JUDGE; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, CHAIRMAN, THOMAS WILKEY, EXECUTIVE DIRECTOR; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, CHAIRMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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92 pp

QUESTIONS PRESENTED

1. Is a state's judicially determined purpose of "minimizing uncertainty in the minds of potential investors," sufficiently compelling to justify the enforcement of a state law which abridges the fundamental right of individual citizens of that state to petition the state court for a redress of grievances, even grievances that are deeply rooted in the State Constitution?

2. Whether plaintiffs' fundamental rights to petition the government for a redress of constitutional grievances (First Amendment), to a guarantee against State laws which abridge fundamental privileges and immunities (Section 1, Clause 2 of the Fourteenth Amendment), to have state judges bound by the provisions of the U.S. Constitution (Article VI, cl 2), and to a government republican in form and substance (Article IV, Section 4) have been violated by the New York State Legislative and Executive when they enacted State Finance Law Section 123-b(1) which, in the case of matters involving the incurrence of public debt, is preventing plaintiffs from petitioning State courts for a redress of State ***constitutional*** grievances, and by the N.Y. State Judiciary in enforcing State Finance Law 123-b(1).

3. Whether plaintiffs' fundamental right, as expressed in Article III, Section 16 of the New York Constitution (State Legislature prohibited from enacting a law which provides that another law is a part of it or applicable to it without ***"inserting"*** the other law in it, at least by reference) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by the enactment of Chapters 412 and Chapter 413 of the New York Laws of 1996.

4. Whether plaintiffs' fundamental right, as expressed in Article VII, Section 11 of the New York Constitution (State Legislature prohibited from enacting a law to create a state debt subject to voter approval, unless the purpose of the debt

is ***"distinctly specified therein"***) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by Chapter 412 when read together with Chapter 413 of the New York Laws of 1996.

5. Whether plaintiffs' fundamental right under the First Amendment to the United States Constitution and under Article I, Section 9 of the New York Constitution (guaranteeing free elections, i.e., elections free from governmental interference and corruption) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by the State's promotional activities to secure passage by the voters of a statewide ballot question.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT L. SCHULZ and JOHN SALVADOR, JR.

Petitioners,

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and MICHAEL FINNEGAN, CHIEF COUNSEL TO THE GOVERNOR, and GARY SHEFFER, SPOKESMAN FOR THE GOVERNOR; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, MAJORITY LEADER OF THE SENATE; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, CHIEF JUDGE; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, CHAIRMAN, THOMAS WILKEY, EXECUTIVE DIRECTOR; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, CHAIRMAN,

Respondents.

OPINIONS BELOW[1]

The Opinion and Order of the New York State Court of Appeals is reported at 92 NY2d 1, entered June 9, 1998.

The Decision and Order of the New York State Supreme Court, Appellate Division, Third Department is reported at 233 AD2d 43, entered July 17, 1997.

The Decision and Order of the New York State Supreme Court, Albany County, is unreported, entered November 7, 1996.

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[1] The opinions of the U.S. Court of Appeals for the Second Circuit and of the U.S. District Court for the Northern District of New York, in a related case, are included as Appendix D & E.

JURISDICTION

The Opinion and Order of the New York Court of Appeals was entered on June 9, 1998.

In accordance with Rule 13.4 of this Court, this petition is filed within 90 days of the date of the Opinion and Order of the New York Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

1. The preamble to the Constitution of the United States provides: ***"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defence, promote the general Welfare and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."***

2. Article III, Section 2 of the Constitution of the United States provides: ***"The judicial power shall extend to all cases in Law and Equity, arising under this Constitution...."***

3. Article VI of the Constitution of the United States provides in relevant part: ***"The Judges in every state shall be bound by this Constitution."***

4. The First Amendment to the United States Constitution reads, in relevant part: ***"Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances."***

5. The Fourteenth Amendment (Clause 2) to the United States Constitution provides, in relevant part: ***"No state shall make***

or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."

6. An implicit constitutional (structural) safeguard is ***"separated powers"*** among the legislative, executive and judicial branches.

7. Article IV, Section 4 of the United States Constitution reads in relevant part: ***"The United States shall guarantee to every citizen in this Union a republican form of government."***

NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8. New York State Finance Law Section 123-b(1) reads: ***"notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution, or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation."*** (Petitioners' emphasis)

9. Article I, Section 9.1 of the New York Constitution provides in relevant part: ***"No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government or any department thereof...."***

10. Article III, Section 16 of the New York Constitution reads: ***"No act shall be passed which shall provide that any***

existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

11. Article VII, Section 11 of the New York Constitution reads: ***"No debt shall be hereinafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein."*** (Petitioners' emphasis).

12. Chapter 412 of the New York Laws of 1996 entitled, "The Clean Water/Clean Air Bond Act."

13. Chapter 413 of the New York Laws of 1996 (untitled).

STATEMENT OF THE CASE

A. INTRODUCTORY STATEMENT

NOTE: *In October, 1996, petitioners filed two lawsuits in which identical federal questions were raised. One suit was filed in the U.S. District Court on October 13, 1996. The other was filed in the N.Y. State Supreme Court for Albany County on October 16, 1996.*

The federal case was decided by the Second Circuit on April 6, 1998. On July 4, 1998, a Petition for a Writ of Certiorari to the US Court of Appeals for the Second Circuit was filed with this Court. See No. 98-81. This petition relates to the State case; the appendices include the decisions by the federal courts. The state case was decided by the N.Y. Court of Appeals on 6/9/98.

The identical federal questions raised in the two lawsuits can be summarized as follows:

1. *Whether State Finance Law Section 123-b(1) is an unconstitutional "door closing" law which violates the First Amendment and Article I, Section 9.1 of the N.Y. Constitution and, thus, the federal "privileges and immunities" clause of the 14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution, and whether enforcement of SFL 123-b(1) by State judges violates Article VI of the U.S. Constitution.*
2. *Whether Chapter 412 and Chapter 413 of the N.Y. Laws of 1996 are violative of Article III, Section 16 and the "distinctly specified therein" requirement of Article VII, Section 11 of the N.Y. Constitution and, thus, the federal "privileges and immunities" clause of the 14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution.*
3. *Whether the actions of certain state officials to entice "yes" votes to sway the results of a statewide vote on Chapter 412 were violative of the 1st Amendment and Article I, Section 9.1 and Article VII, Section 8 of the N.Y. Constitution and, thus, the federal "privileges and immunities" clause of the*

14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution.

The Court is asked to declare New York State Finance Law Section 123-b(1) unconstitutional null and void because it is violative of the right to petition clause of the First Amendment and, therefore, the guarantee clause of Article IV, Section 4 and the privileges and immunities clause of the Fourteenth Amendment. Plaintiffs had argued at each stage of the proceedings before the New York courts that SFL 123-b(1) was unconstitutional. The New York Court of Appeals failed to address the question but relied on SFL 123-b(1) to dismiss plaintiffs' principal claims -- that Chapters 412 and 413 of the New York Laws of 1996 were enacted in violation of Article III, Section 16 and the "distinctly specified therein" requirement of Article VII, Section 11 of the New York Constitution.

Assuming the Court will declare SFL 123 b(1) to be unconstitutional, the Court is respectfully requested to then declare Chapter 412 and 413 of the New York Laws of 1996 to be unconstitutional, null and void because they were adopted in violation of Article III, Section 16 of the New York State Constitution, and are, therefore, violative of plaintiffs' fundamental right to a government republican in form and substance under Article IV, Section 4 of the U.S. Constitution, and plaintiffs' civil right to freedom from state laws that abridge their fundamental privileges and immunities as guaranteed by Clause 2 of the Fourteenth amendment to the U.S. Constitution.

This is not a taxpayer action, i.e., a petition for judicial review of the power of the Legislature and Executive branches to tax and spend. Rather this is a petition by citizens for federal judicial review, under, inter-alia, the U.S. Constitution's First Amendment and the "guarantee" and "privileges and immunities" clauses, of the power of the NY's governmental leaders: a) to make and enforce a "door closing" law that disallows persons a forum in which to assert their constitutional rights (if the matter involves the incurrence of public debt), even if the complaint is deeply rooted in the Constitutions of New York and of the United States;

and b) to trade on the credit of the Governor's office to raise money to pay for a blanket of media propaganda with which to cover the voters in order to sway the results of a vote on a ballot question. Plaintiffs' basic right to a free election was violated.

Plaintiffs have detailed some of the constitutional provisions that have been violated and their injuries that fall within the zones of interest to be protected by those constitutional provisions. See Tables 2 - 4 which follow page 18 of this section of the Petition.

Plaintiffs have alleged that New York State Finance Law Section 123-b(1) is violative of the First Amendment because on its face, and in its application, it strips plaintiffs of their right to petition the government for a redress of constitutional grievances. The decision by the New York Court of Appeals failed to consider plaintiffs' First Amendment challenge to SFL 123-b(1). Instead, the Court merely restated the purpose of SFL 123-b(1): "minimizing the uncertainty of potential investors." The Court then used SFL 123-b(1) to dismiss plaintiffs' principal claims against Chapters 412 and 413 of the New York Laws of 1996.

Plaintiffs have alleged that SFL 123-b(1), Chapters 412 and 413, and the State's actions in propagandizing for a "yes" vote should be declared unconstitutional, because, inter alia, each is violative of Section 1, Clause 2 of the Fourteenth Amendment of the US Constitution -- the so-called "privileges and immunities ("P&I") clause." The New York Court of Appeals did not reach these questions.

Plaintiffs have also alleged that each of the three actions should be declared unconstitutional because each is violative of Article IV, Section 4 -- the so-called "guarantee clause" -- under which plaintiffs are guaranteed "a republican form of government" in any state in which they choose to reside, including New York State. In agreeing to join the union in 1787, New Yorkers were guaranteed under Article IV, Section 4, that the United States government would guarantee that the citizens of New York would always enjoy a government republican in form ***and substance***, which includes: popular sovereignty; self-government; a

government that derives its powers from the consent of the governed; ***and a government limited by written Constitutions***. But, the New York Court of Appeals did not reach these questions.

Finally, plaintiffs have also alleged that the behavior of the New York State Governor violated plaintiffs' First Amendment right to a free election when he set up a political action committee and used it as an arm of the government to trade on the credit of his office to raise millions of dollars from private sources, including corporations that have business before the State, in order to cover the electorate with a blanket of media propaganda to sway the results of a vote on a statewide ballot question by enticing "yes" votes. The New York appeals courts abused their discretion in deciding not to address this question which was decided by the Court of original instance and fully briefed before both of the appeals courts.

B. STATEMENT OF FACTS

In 1975, the New York State Legislature and the Executive adopted a law [State Finance Law Section 123-b(1)] which, in its plain language and effect, denies citizens their right to petition their government for a redress of grievances deeply rooted in the New York Constitution -- i.e., to assert their constitutional rights in any forum -- by specifying that citizens shall not be allowed to maintain a lawsuit if the subject matter deals with public debt -- i.e., the "authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the State or any agency, instrumentality or subdivision thereof, or by any public corporation or public benefit corporation."

In 1979, in violation of the "Separate Powers" doctrine, the New York Court of Appeals issued its decision in Wein v. Comptroller, 46 NY2d 394, ruling that SFL 123-b(1) "does indicate a reasonably clear ***legislative*** intent to prevent taxpayer challenges with respect to a State bond issue or notes issued in anticipation thereof [SFL 123-b(1)]. Under the circumstances it would be inappropriate for the courts to confer standing in these cases since such a determination would, in effect, render the statutory

'exception' a nullity and ignore the expressed ***legislative*** policy to the contrary," and that to allow citizens to challenge legislative acts that authorize the incurrence of public debt would "increase the cost of raising revenue ***by creating uncertainty in the minds of potential investors.***" (Plaintiffs' emphasis). *Note: The constitutionality of SFL 123-b(1) under the First Amendment was neither raised, presented nor determined in* ***Wein***.

The New York Judicial branch has been honoring SFL 123-b(1) by dismissing claims that involve public borrowing. By doing so it has been cooperating with the Executive and Legislative branches, allowing the N.Y. Constitution, in effect, to be changed by the Legislature: first, by SFL 123-b(1), and then by various legislative acts which authorize public borrowing and which are obnoxious to the N.Y. Constitution but which are shielded from citizen suits and judicial review by the impenetrable, door-closing barrier represented by SFL 123-b(1).

The latest example of this is the June 9, 1998 decision by the N.Y. Court of Appeals which is the subject of this petition. The decision by the N.Y. Court of Appeals, and those of it two lower courts, are included as Appendix A, B and C hereto. The N.Y. Court of Appeals dismissed, for lack of standing by virtue of SFL 123-b(1), plaintiffs' Article III, Section 16 challenge to Chapters 412 and 413 of the N.Y. Laws of 1996. The court ruled, in effect, that it is more important for the state to "minimize uncertainty in the minds of potential investors" than to allow citizens to exercise their fundamental right to petition the government for a redress of grievances caused by legislative acts authorizing public borrowing (Chapter 412 and 413), even if those legislative acts are repugnant to the N.Y. Constitution. One would not know from a reading of the decision by the Court of Appeals that plaintiffs had fully argued at all three levels of the N.Y. court system that SFL 123-b(1) was unconstitutional as violative of the petition clause of the First Amendment. Having dismissed plaintiffs' Article III, Section 16 claim against Chapters 412 and 413 for lack of standing under SFL 123-b(1), the state court was then able to dismiss plaintiffs' Article VII,

Section 11 "distinctly specified therein" claim against Chapters 412 and 413 as "irrelevant".

On or about July 14, 1996, the New York State Legislature passed Chapter 412 of the laws of 1996 ("Chapter 412 L96"), an Act authorizing the creation of a state debt to the amount of one billion seven hundred and fifty million dollars ($1,750,000,000) and providing for the submission to the people of a proposition or question therefor to be voted on at the general election in November 1996. The two-page Act was entitled, "The Clean Water/Clean Air Bond Act of 1996.

On or about July 14, 1996, the New York State Legislature also passed Chapter 413 of the Laws of 1996 ("Chapter 413 L96"), an Act "in relation to the implementation of the Clean Water/Clean Air Bond Act of 1996." Chapter 413 L96, which is 50 pages, was not given a title. It contained the definitions, purposes and specificity missing from Chapter 412 but required to be there by Article VII, Section 11 of the N.Y. Constitution.

On or about August 1, 1996, Governor Pataki signed Chapter 412 and Chapter 413 L96. Chapter 412 was to become law immediately upon approval by the voters at the general election on November 5, 1996. Chapter 413 L96 was to become law *if the voters approved Chapter 412*.

The public was told about the signing of Chapter 412. ***The public was not told about Chapter 413.***

On or about August 2, 1996, the New York State Board of Elections, as required by law, sent the local Boards of Election a certification of the text of ***Chapter 412***, the abstract of ***Chapter 412*** and the form of submission of Proposal Number One, A Proposition relating only to ***Chapter 412***. ***Nowhere in the certification to the local boards of election did the Board of Elections make any reference to Chapter 413.***

The following is the question that went before the voters on November 5, 1996: "Shall ***Chapter 412*** of the Laws of 1996

known as the Clean Water/Clean Air Bond Act of 1996, authorizing the creation of State debt to provide moneys for the preservation, enhancement, restoration and improvement of the State's environment and natural resources in the amount of one billion seven hundred fifty million dollars ($1,750,000,000) be approved?" (Plaintiffs' emphasis).

Chapter 412 is two pages in length. It makes absolutely no reference to ***Chapter 413*** which is 50 pages in length. ***Chapter 412*** became effective immediately upon approval by the voters at the general election on November 5, 1996. ***Chapter 413*** became effective upon the approval by the voters of ***Chapter 412***. However, the public was never told about ***Chapter 413!*** The public was not told that they were voting to approve Chapter 413 as well as Chapter 412.

On September 11, 1996, to entice a "yes" vote on the Bond Act proposition on the November ballot, Governor Pataki placed two of his most senior political operatives (Chief Counsel Michael Finnegan and Chief Spokesman, Gary Sheffer) on a temporary leave of absence for the expressed purpose of creating a political action committee (PAC), to raise more than $1 million from Wall Street firms and others that would benefit financially if the Bond Act passed the voters, and to use that money to pay for TV ads which would blanket the electorate for two weeks prior to the election. ***These TV spots featured the Governor explicitly exhorting the electorate to "vote yes" on Proposition No. 1 (approving Chapter 412).*** No other information was included.

The Governor used the PAC, in effect, as an arm of the government: to trade on the credit of his office; and to raise money, particularly from businesses that have business before the state, in order to pay for TV ads in which the Governor explicitly exhorted the voters to "vote yes" on the ballot question. Those businesses include, but by no means are limited to, those listed on Table 1 which follows this part of this petition. Of the $1.726m raised by the PAC, $1.275m was spent on the governor's TV ads. This obviously interfered with plaintiffs' First Amendment right to an election free from governmental interference and corruption.

An informed electorate is crucial to our democratic-republic. However, other than the Governor's TV "vote yes" exhortations, and the certification sent to the County Boards of Election regarding ***Chapter 412***, the government failed in its duty to inform the voters about the purposes of the debt; ***Chapter 413, the 50-page bill which contained the details on the use of the Bond Act proceeds, was never mentioned.***.

The vote on the Bond Act (Chapter 412) passed with about 2.1 million "yes" votes and 1.7 million "no" votes.

C. STAGES IN THE PROCEEDING WHERE THE FEDERAL QUESTIONS WERE RASIED

Re: Question No. 1 and No. 2 regarding the constitutionality of SFL 123-b (1).

On October 22, 1996, in the court of original instance, State defendants filed a motion to dismiss for lack of standing to raise the Article III, Section 16 claim, citing SFL 123-b(1). Defendants' 10/22/96 Memorandum of Law in support of their motion to dismiss presented arguments in support of their motion on page 34.

On October 25, 1996, in response to defendants' Motion to Dismiss for lack of standing under SFL 123-b(1), plaintiffs' first raised the First Amendment challenge to SFL 123-b(1). Paragraphs 98 through 103 of plaintiffs' 10/25/96 Affidavit contain plaintiffs' arguments.

The Honorable Joseph Harris (J.S.C. - Albany County) did not dismiss any of plaintiffs' original claims for lack of standing. See Appendix C hereto. Therefore, on appeal to the Appellate Division, plaintiffs did not argue the constitutionality of SFL 123-b(1) in their Appellants' Brief. However, the State's defendants did resurface the threshold question of standing under SFL 123-b(1) in their Respondents' Brief. Therefore, in their Reply Brief, plaintiffs again presented and argued the question of the

constitutionality of SFL 123-b(1). Plaintiffs did so on pages 1 and 7 -15 of their Reply Brief.

Finally, the question of the constitutionality of SFL 123-b(1) was fully briefed and argued by the plaintiffs before the New York Court of Appeals. They did so on pages 3 - 6 and 66 -75 of their Appellants' Brief and on pages 1 - 3 of their Reply Brief.

Re: Questions No. 3 and No. 4 regarding the constitutionality of Chapters 412 and 413.

The federal constitutional questions regarding Chapters 412 and 413 were presented in plaintiffs' original complaint as filed in the New York State Supreme Court, Albany County, and were, of course, fully argued by plaintiffs and defendants at each of the three levels of the state court.

Re: Question No. 5 regarding the constitutionality of the acts of the State in swaying the results of a statewide vote.

The federal constitutional questions regarding the behavior of state officials to sway the results of the statewide vote on Chapter 412 of the Laws of 1996 were presented in plaintiffs' original complaint as filed in New York State Supreme Court and were, of course, fully argued at each of the three levels of the state court.

TABLE 1

CONTRIBUTIONS TO THE CLEAN WATER/CLEAN AIR BOND ACT COMMITTEE BY CORPORATIONS WITH BUSINESS BEFORE THE STATE: A SAMPLE

Bankers That Help The State Issue Bonds

Goldman Sachs	$25,000
First Albany	25,000
Morgan Stanley	25,000
J.P. Morgan	25,000
Paine Webber	25,000
Merrill Lynch	25,000
Dillon Read	25,000
Chase Manhattan	25,000
Lehman Brothers	25,000
Bear Stearns	25,000
Smith Barney	25,000

Law Firms That Help The State Issue Bonds

Hawkins, Delafield & Wood	$10,500
Dewey Ballantine	10,000
Skadden, Arps, Slate, et al.	5,000
Brown & Wood	2,500

Insurer of State Bond Issues

MBIA	$25,000

Table 2

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
("Constitutional Standing" issue)

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated	State Constitutional Rights Violated
Whether Sec. 123-b(1) of NY State Finance Law violates plaintiffs' constitutional rights, including right to petition the government for a redress of grievances and right to a republican form of government.	Loss of sovereignty. Erosion of liberty. Substantial public debt Substantial tax revenue requirement. Adds to existing burden-some debt and personal tax load.	1st Amendment: Right to petition government for a redress of grievances. Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state.	Article I, Section 9.1: Right to petition government for a redress of grievances. Article I, Section 6: Right not to have money property taken without constitutional due process.

Table 3

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
("Clean Water/Clean Air Bond Act Issue")

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated	State Constitutional Rights Violated
Whether by turning a blind eye to three provisions of The NY Constitution, in adopting the Bond Act, the state defendants violated plaintiffs' federal constitutional rights, including the right to a government republican in form and substance.	Loss of sovereignty. Erosion of liberty. Substantial public-debt incurred. Substantial tax revenue requirement. Adds to existing burdensome debt and personal tax load	Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state. 5th Amendment: Right not to have money property taken without constitutional due process.	Article III, Section 16: Right to have Chapter 413 L96 referenced if not "inserted" in Chapter 412 L96. Article VII, Section 11: Right to have purpose of the Bond Act debt "distinctly specified therein," i.e., in Chapter 412 L96, not Chapter 413 L96. Article VII, Section 11: Right to have Bond Act debt be for "single work or purpose".

Table 4

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
(the "free election" Issue)

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated
Whether plaintiffs constitutional rights were violated by the actions of State officials as they traded on the credit of the Governor's office to raise millions of dollars from corporations that have business before the state or who would have business before the state if the Bond Act was approved by the voters, to cover the voters with a blanket of media propaganda featuring the Governor explicitly exhorting the electorate to "vote yes".	1. Loss of sovereignty. 2. Erosion of liberty. 3. Vote was tainted due to government propaganda. 4. Less effective vote.	1. 1st and 9th Amendment: Right to freely and effectively petition the government through ballot box voting, without government sponsored propaganda. 2. Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 3. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state.

REASONS FOR GRANTING THE WRIT

A. BASIC RIGHTS HAVE BEEN TAKEN WAY BY THE STATE. AT THIS POINT, ONLY THE U.S. SUPREME COURT CAN RESTORE THOSE RIGHTS.

Plaintiffs' First Amendment right to petition the government for a redress of grievances, involving unconstitutionally incurred public debt, has been taken away by the New York State Legislature and Executive. ***Only the U.S. Supreme Court can restore that right.*** The Legislature and the Executive enacted the exception language SFL 123-b(1) which declares, in essence, that the court house door is closed to citizen-petitioners in cases where they are seeking to obtain compliance with debt-limiting restrictions of the N.Y. Constitution. It is now necessary for the U.S. Supreme Court to declare SFL 123-b(1) to be unconstitutional.

Plaintiffs' fundamental right to a "separation of powers" has been infringed by the Unified Court System of New York. ***Only the U.S. Supreme Court can restore that right.*** The New York State Judiciary has been cooperating with the Legislature and Executive by enforcing SFL 123-b(1). Since 1992, the Judiciary has dismissed seven of plaintiff Schulz' lawsuits for lack of standing under SFL 123-b(1). Those lawsuits were filed against the Legislature and the Executive for enacting laws authorizing the incurrence of public debt in spite of specific New York constitutional restrictions.

Plaintiffs' fundamental First Amendment right to an election free from governmental interference and corruption has been infringed by the N.Y.S. Executive and Judiciary. ***Only the U.S. Supreme Court can remove that stain and prevent the problem from happening again.*** On September 11, 1996, in order to sway the results of a statewide vote on Proposition No. 1 (approving Chapter 412), the Governor placed two of his top aids, including his Chief Counsel, on a two-month leave of absence for the expressly stated purpose of creating a political action committee, thereby trading on the credit of the Governor's office to raise millions of dollars from private corporations that have business

before the state or who would benefit from voter approval of Proposition No. 1, all for the purpose of paying for a blanketing of TV propaganda featuring the Governor explicitly exhorting the viewer to "vote 'yes' on Proposition 1." The ad was aired repeatedly day after day, for 14 days prior to the election. The ad gave no information about Proposition 1 and was obviously not intended to educate the public about how much debt would be incurred or how the money would be spent if the people approved Proposition 1. No other information was presented by the Legislature or Executive to the public regarding Proposition 1. The sole expression was of the persuasive personality of the Governor, ***thereby violating the constitutional proscription against undue governmental influence in elections***.

Plaintiffs' constitutional right to have their State judges comply with the provisions of the U.S. Constitution has been taken away by the New York State Judiciary. ***Only the U.S. Supreme Court can restore that right.*** Plaintiffs have argued four cases before the N.Y. Court of Appeals where the matter involved a constitutional attack on the incurrence of public debt. In each case the Court of Appeals has failed to address plaintiffs' First Amendment attack on SFL 123-b(1) only to use SFL 123-b(1) to dismiss plaintiffs' claims for lack of standing.

Plaintiffs' right to a State government republican in form and substance and their guarantee of freedom from the making and enforcement of State laws that abridge their fundamental privileges and immunities have been taken away. ***Only the U.S. Supreme Court can restore those rights.***

B. THE STATES NEED TO BE REMINDED THAT THEY ARE LIMITED BY WRITTEN CONSTITUTIONS.

The passage of time produces corruption of principles. It is the duty of good citizens to be ever on the watch against this, and if the gangrene is eventually to prevail, let the day be kept off as long as possible. The primary role of the court, we believe, is to protect the people from the unrestrained acts of the government --

i.e., to keep the Legislature and Executive harnessed to the will of the people ***as expressed in their constitutions***.

NY plaintiffs, together with other ordinary, non-aligned citizens, have been degraded from the prime rank, which they ought to hold in human affairs, by a willfully wayward state government that is behaving as if the NY Constitution belongs to it rather than to the people and, therefore, may be disregarded at will.

Plaintiffs' cause portrays the three branches of their state government as cooperating in the making and enforcing of laws which abridge plaintiffs' privileges and immunities as both explicitly and implicitly expressed in the United States and New York State Constitutions.

Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In New York, despite massive misunderstanding, it rests with the people. However, in the practice and even in the science of politics, there has been frequently a strong current in New York against the natural order of things. In New York, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it.

The state, rather than the people, for whose sakes the state exists, is frequently the object which attracts and arrests the principal attention. This has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state politics. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial language.

Since the very beginning, the acts of the early national congresses and the acts of the early conventions, including the congress and committees of New York, are replete with expressions with respect to "republicanism" and to the "sovereignty of the people," and the servant nature of governments at all levels. It is to the honor of the United States that in no other country are subjects of this kind better -- or even so well -- understood. One fact stands

out: the attention and attachment of the Constitution of the United States and of the New York Constitution to the rights of the sovereign people are discernible, as hard copy, in almost every provision of these documents. It is to be deeply regretted that the constitutional principles which are the cause of action in our lawsuit has not yet received its merited acquiescence and approval as basic principles of governance -- at least, not from New York State's Legislative, Executive and Judicial branches.

The United States and New York have, in their constitutional language, advocated both the form and substance of constitutional republicanism, with its emphasis on individual rights and governmental responsibility for protecting and enhancing them. Operationally, however, these principles are honored more in the breach than in the observance. There still may be reason to hope that the government of New York, in all three of its branches, may yet perceive the wrongness of actions it has taken, such as interdicting the right of the people to petition their government for a redress of grievances, interfering with the people's right to a free election unmarred by the intrusion of governmental powers, incurring public debt in spite of constitutional restrictions, using public resources for private purposes and attempting to exempt the government that represents the body of her citizens from that "suability" which alone enables her citizens to assert their individual, fundamental rights and to seek and obtain the protections of their Federal and State constitutions. It is with this hope in mind that we petition this Court.

The people have good reason to be thankful for their valuable liberties and privileges. Nothing but forthright insistence upon the perpetuation of constitutional law and government can insure the continuance and enhancement of their liberties and privileges. ***Under the circumstances, in New York, the people cannot do this without actions that would threaten their peace and tranquillity. It becomes necessary for the U.S. Supreme Court to apply the rule of law.***

C. THIS IS NOT A "TAXPAYER ACTION".

Lest anyone argue jurisdiction based on some holding that ours is a generalized rather than a particularized grievance, or that our injury is not concrete or measurable, we say again that this is not a taxpayer action in any respect. We are seeking, inter alia, the protection of the guarantee clause -- not because there is property or money involved but because of our right to a government republican in form and substance.

Allow us to make a comparison that we believe is logical and conclusive. In matters of law it is imperative that logic should prevail.

The federal right to a government republican in form and substance is as absolutely precious to us as the federal right to a government separate from the church is to a person whose interest lies in that area. How precious it is in both cases depends on the knowledge of what is being lost when the Constitution is not being followed. Both viewpoints and value systems and the people who hold them are entitled to equal treatment under the law.

Say a person drives past a town hall on Christmas eve and sees a manger scene, complete with Kings, Wisemen, Joseph, Mary and baby Jesus. Or, that person, of another faith, say, attends a concert at the Schuylerville High School auditorium and is confronted with a massive hand painted mural on the side wall depicting among other biblical scenes, the crucifixion.

That person says, "This is an affront to me." That person expresses a formal complaint to authority because that person has specialized knowledge of the Constitution. That person's harm falls with the zone-of-interest to be protected by the First Amendment's Establishment Clause. But, ***as in our case***, that person's injury is a generalized rather than a particularized injury. Is it concrete or measurable? No! But, that person ***has standing to maintain his action in court.***

We are here because we, too, have a specialized knowledge of the Constitution. We, too, are here because we are subject to ethical and moral imperatives. We, too, are constrained by our knowledge of the U.S. and N.Y. Constitutions and by our devotion to liberty, to freedom from the unrestrained acts of government, to constitutional governance carried out in decency and good order. ***Republicanism,*** to us, is a passion that should be judged at the same level of intensity as that portrayed by a vigilant individual seeking redress under the Establishment Clause. In this wise, it is seen that the Establishment Clause and the Guarantee Clause walk hand in hand.

Plaintiffs, themselves, have been successful in court in using the Constitution as a shield against governmental behavior which violated the Establishment Clause. In so doing, we did not have to prove the measure of our injury. We are now using the Constitution as a shield against government behavior which violates the Guarantee Clause -- ***a right at least as fundamental and foundational as the right protected by the Establishment Clause.*** Yet, in the companion federal case (and potentially, here), our standing is being challenged.

It is apparent that we are, indeed, at the beginning of what may well become a long line of precedents regarding the Guarantee Clause, as has been the case with the Establishment Clause. Because constitutional government, with all that implies, has become so sought after and important and because it establishes performance standards that are being imperfectly met, we can, indeed, expect a cascade of cases under the Guarantee Clause. It follows as the night the day. The body of Establishment Clause cases was allowed to proceed without quantifiable measurable, concrete, particularized harm to the complainant. We perceive ourselves as having the same right. We are offended by what we see happening. We are affronted by a loss of liberty, by an erosion of popular sovereignty. These are as offensive to us as is the use of religion in the wrong place.

The failure of those in authority to adhere to the constitutional principles that bring us to this court is changing the system of governance -- that is, corrupting it in ways that are at once daring

and subtle. It is the failure to adhere to our foundational principles of republicanism that allows those who carry out the governance process to begin to assume that they, rather than the people they serve, are the principals – the sovereign. And, because of this, they assume that they are unrestrained, not limited by the written Constitution, and are able to be adventuresome with impunity as with SFL 123-b(1), and with Chapters 412 and 413 and by propagandizing elections.

Our cause in this case is still somewhat novel. The Guarantee Clause has been an infrequent subject of litigation. The application of the Guarantee Clause, with its emphasis on republicanism and the freedom from the unrestrained acts of government, to the acts of the State in a way that is intelligent and forceful rather than emotional and demonstrative, will become as common as the application of the Establishment Clause -- the sole ingredient is knowledge and vigilance.

D. THE PEOPLE NEED TO HAVE THE COURT REVISIT THE GUARANTEE CLAUSE.

Lest anyone argue jurisdiction based upon some holding that early decisions by this court place all questions raised under the Guarantee clause in the realm of political, rather than judicial, considerations, we offer the following:

This case is clearly distinguishable from what some consider to be the dispositive case -- Pacific Telephone and Telegraph Co. v. Oregon, 233 U.S. 118 (1912). In Pacific Telephone the issue was whether an amendment to the Oregon Constitution for direct legislation violated: 1) the provisions of the Act of Congress admitting Oregon to the Union; or 2) Article IV, Section 4 of the U.S. Constitution guaranteeing a republican form of government.

The instant case is distinguishable from Pacific Telephone in at least two ways:

(1) The New York Constitution has never been before the U.S. Congress for review or approval. Unlike Oregon's, it was adopted long before the Union was formed.

(2) Here, unlike Pacific Telephone, plaintiffs are not asking the Court to decide which of two State governments is the legitimate State government. In Pacific Telephone the court was asked to decide if the state government that existed in Oregon by act of Congress, and before its citizens added the citizen initiative and referendum amendment to the State Constitution in 1902, was the legitimate state government; or, if the government that existed under the Oregon Constitution as amended in 1902 was the legitimate government. The Pacific Telephone court made clear its view that if it found that the Oregon State Constitution, as amended in 1902, was violative of Article IV, Section 4's guarantee clause, the validity of every statute passed on Oregon since the adoption of the initiative and referendum amendment to the State Constitution would be affected, and ultimately, the question of whether there was a legislative and judicial branch in Oregon would have to be answered. The court decided the matter was purely political and would have to be decided by Congress. It is interesting to note that the court went to great lengths to show how its decision was so conclusively established by a prior decision of the U.S. Supreme Court "as to cause the matter to be absolutely foreclosed." The court said the controlling case was Luther v. Borden, 7 How. 1, 12 L Ed 581, which the court said grew out of the Dorr Rebellion in Rhode Island. In Luther the court was asked to decide which of two state governments was the legitimate government: the government which grew out of a voluntary constitutional convention or the "Charter government." In Luther the U.S. Supreme Court found that to select the former would nullify all the laws, taxes, salaries and court judgments -- a disastrous effect. In the instant case the issue is not which of two State governments is the legitimate government but whether the State is acting legitimately -- observing the republican principles upon which the State government was founded. ***The question in the instant case is not a political question***. Plaintiffs are not asking the court to decide which of two state governments is the legitimate government. Plaintiffs are asking the court to rein in the legitimate state government in New York which is "willfully

wayward" in that it is violating the basic republican principles of popular sovereignty, government based on the consent of the people, and "separation of powers," provided by both the U.S. and N.Y. Constitutions. In Pacific Telephone, the court ruled that the question before it was "purely political." It said, "Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which is called to the bar of this court, ***not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.***" Pacific Telephone & Telegraph Co. v. Oregon, 233 U.S. 118, 150 (1912). (Plaintiffs' emphasis). Obviously, the case before the bar is distinguishable from Luther v. Borden, 7 How. 1, 12 L. Ed 581, and its prodigy, including Pacific Telephone & Telegraph Co. v. State of Oregon, 233 U.S. 118 (1912). Here, plaintiffs are calling the government of New York State to the bar for the purpose of testing judicial attitudes regarding the exercise of power, which is being assailed on the ground that its exertion has injuriously affected the rights of citizen plaintiffs because of repugnancy to certain constitutional limitations. Unlike plaintiffs in Luther and Pacific Telephone, plaintiffs here are not in court to demand of the state that it establish its right to exist as a state.

E. IN THE INTEREST OF JUSTICE, IT IS THE RIGHT THING TO DO.

Reports are beginning to appear in the national press that the governments of states other than New York are also becoming "innovative and monarchical" in their attempts to circumvent the debt-limiting restrictions of their State Constitutions. The

question of "willfully wayward" states can only be addressed effectively by this tribunal.

We know that the conclusions of leading thinkers and analysts on government and the "rights of man" -- present and long past -- harmonize with the principles which underlie and defend our argument on the questions now before the Court in this petition for a writ of *certiorari* related to the lawsuit which is the cause of this petition.

The extension of the judicial power of the United States Supreme Court to the controversy of this lawsuit appears to be wise, because, in the thoughts and words of the earliest members of this court, it would be "both honest and useful."

It would be honest because the Court, in its political unassailability, provides for the doing of justice without respect to persons, and for making individual citizens, as well as the States, secure in their respective rights. It would fulfill the promises which a free government makes to every free citizen -- the promise of equal justice and the protection of the laws; the promise of due deference to the sovereignty of the body of the people; and, the promise of due allegiance to the design imperatives -- the need to maintain a separation between and among the powers of governance: legislative, executive and judicial, and the need to acknowledge that government derives its just powers from the consent of the governed ***and are, indeed, limited by written Constitutions.***

It would be useful for several reasons: because it would leave not even the least of its citizens without the means of obtaining justice from the State; because it would obviate the need for occasions of contests and violent quarrels between the citizens and their State due to the arising of claims that the design imperative principle of "a State government republican in form and substance" (with all that that statement includes and implies) is being or has been abandoned; because it would rest on the great moral truth that justice is the same whether due from one man to a million or from one million to one man; because it would teach

and greatly enhance the value of our free republican form of government which places all persons on an equal footing and enables all to obtain justice without regard to the power or number of their opponents; because, based on the great principle that the great body of the people is the true sovereign of their States and of the nation; and, because, consequently, individual citizens are not to be degraded or penalized for appearing with each other in their own courts to have their controversies resolved.

What we intend to argue is, essentially, that citizens, in our constitutional system, have an inalienable right to have a State government that is republican in form ***and substance***, through the structures and processes of which *governance* is provided, but only with the consent of the governed, and that, in New York State, these principles -- the "design imperatives" -- are being violated when: (1) the branches of government -- Legislative, Executive and Judicial -- which are designed to serve the people and to be independent elements in a system of checks and balances, combine to work together in obvious harmony to achieve private or political ends that neither (a) exhibit compliance with the constitutional requirement for their own independence in thought and action, nor (b) result in demonstrable achievement of the public benefit and good; and (2) when citizen grievances (which would seem to indicate a measure of non-consent) are denied access to the judicial decision-making process in key public-debt issues, in obvious violation of the fact that any citizen has the constitutional right to petition the government for a redress of grievances, especially those that are rooted in the State Constitution.

Assuming that the foregoing are "givens," we are petitioning the Supreme Court of the United States of America, to review this matter, which finds itself at the root of the constitutional design-imperatives being violated, as set forth above, and to admit this petition for a writ of *certiorari* based upon the principle set forth in one of the earliest *dicta* of the U.S. Supreme Court that, when an aggrieved citizen of a State, finding himself with no other recourse to achieve the redress of grievances that are based upon constitutional rights and the need for interpretation thereof, the

appropriate court of jurisdiction is the U.S. Supreme Court. See Chrisholm Ex'r v. Georgia, 2 Dall. 415, 1 L.Ed. 440.

Additionally, as petitioners we are seeking, for ourselves and for the citizenry of New York State, in general, a measure of simple justice, based on the cardinal principle that "justice is justice" – whether it is meted out to one man or to a million, to one person or to a "body" of persons. On the other hand, it should be noted that the existence of ***injustice*** does not have to be recognized by all members of a body afflicted by it, in order for it to "be" injustice. Indeed, it is an historical fact that the fathers of this country and the designers of the great doctrines and principles that have shaped its development, were led by one or two perceptive individuals who recognized the degree to which the injustices of despotism were being visited upon the people, and wrote major documents that exposed them as violations of the natural laws – the "rights of man" – that underlie and shape the basic doctrines – the constitutions and statutes that frame and preserve our system and our society, today.

The pursuit of justice, in fulfillment of the constitutional design-imperatives expressed above (the right to have a State government republican in form and substance, that is subject to the consent of the governed, and the right of the governed to petition their government for a redress of grievances) is the rationale behind this petition, based upon the types of constitutional inconsistencies perpetrated by the State of New York – injustices that obviously demand the attention of the U.S. Supreme Court.

DATED: September 5, 1998

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Appendix A

New York State Court of Appeals

IN THE MATTER OF ROBERT SCHULZ ET AL., APPELLANTS, v. NEW YORK STATE EXECUTIVE, ET AL., RESPONDENTS.

98 N.Y. Int. 0067.
June 9, 1998

3 No. 47

[98 NY Int. 0067]
Decided June 9, 1998

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Robert L. Schulz, pro se, appellant.
Denise A. Hartman, for respondents Pataki, Silver & Bruno.
Submitted by Frederick A.O. Schwarz, Jr., for respondents Finnegan & Sheffer.

KAYE, CHIEF JUDGE:
The Clean Water/Clean Air Bond Act of 1996 (the "Bond Act") passed by the Legislature, signed by the Governor and approved by referendum at the November 1996 general election authorized the creation of a State general obligation debt of $1,750,000,000 to be used "for the single purpose of preserving, enhancing, restoring, and improving the quality of the state's environment" (L 1996, ch 412, § 2). At the same time, the Legislature amended the Environmental Conservation Law, adding a new article 56 to implement the Bond Act (L 1996, ch 413).

The Bond Act specified that the moneys received from the sale of the bonds would be expended to create a safe drinking water program ($355 million); to fund projects related to the

improvement and enhancement of water quality including programs focused on open space land conservation, parks, historic preservation and heritage areas ($790 million); to improve solid waste facilities ($175 million); to restore contaminated properties ($200 million); and to improve and enhance air quality ($230 million) (L 1996, ch 412, §4). The implementing legislation particularized how the bond proceeds would be allocated and expended, including funding for the Hudson River estuary plan, the Department of Environmental Conservation's "great lakes program," landfill closure efforts in New York City, municipal recycling projects, environmental restoration projects, and comprehensive conservation and management plans for the Long Island Sound, Lake Champlain, Onondaga Lake, the New York/New Jersey Harbor and the Peconic Estuary.

In October 1996, petitioners commenced this combined declaratory judgment action and article 78 proceeding for adetermination that the Bond Act and its related implementing provisions violate article VII, § 11 and article III, § 16 of the New York State Constitution. Petitioners subsequently sought both summary judgment and a preliminary injunction to remove the referendum from the ballot. Respondents, in turn, moved to dismiss on a number of threshold grounds.

Supreme Court, after a hearing, denied petitioners' request for an injunction, determined that petitioners lacked standing and concluded that the Bond Act did not violate the cited constitutional provisions. After we transferred petitioners' direct appeal to the Appellate Division (89 NY2d 933), that court while finding standing to assert a challenge under article VII, § 11 of the State Constitution affirmed. Petitioners appealed as of right pursuant to CPLR 5601(b)(1). [n.1] Agreeing with the Appellate Division, we now affirm.

Single Work or Purpose Requirement

We first consider the threshold issue of standing to challenge the Bond Act as violative of the "single work or purpose" requirement set forth in article VII, § 11 of the StateConstitution. [n.2]

As a general principle, citizen taxpayer status does not confer standing to challenge the issuance of State bond acts. That principle is grounded on a recognition that such lawsuits "increase the cost of raising the revenue by creating uncertainty in the minds of potential investors" (see, Wein v Comptroller of State of New York, 46 NY2d 394, 400; State Finance Law § 123 b[1]). As we held in Matter of Schulz v New York State (81 NY2d 336, 344 347, cert denied 513 US 1127 [" Schulz I"]), however, there are limited instances when a voter may challenge a bond issue on the basis that it infringes upon explicit voter protections provided by article VII, § 11 of the State Constitution. Such an instance is presented by petitioners' first challenge.

Article VII, § 11, which sets forth the prerequisite of a public referendum for all proposed long term public debt, also mandates that proposed public financing schemes must be "for some single work or purpose, to be distinctly specified therein." That requirement prevents the Executive and Legislative branches of our State government from embracing in one bond act several distinct and unrelated purposes, none or some of which could singly obtain referendum approval (see, Problems Relating toTaxation and Finance, 1938 New York State Constitutional Convention Committee Report, vol
X, p. 87 [the "Poletti Report"]). By restricting each bond act to a single work or purpose, referendum approval cannot be procured by combining the votes of several different groups, each with an interest in one of the bond act's multiple purposes, and thereby creating a majority that will approve them all (see, New York Pub. Interest Research Grp., Inc. v Carey, 59 AD2d 172, 176, rev'd on other grds 42 NY2d 527).

The requirement also assures that several different purposes some of which are not independently worthy of referendum approval will not be combined in a single bond act in the hopes that the voters will not separately evaluate the relative merit and strength

of each purpose. If voters could not bring a claim for violation of that clause, the Executive and Legislative branches could safely ignore it altogether, and referendum approval garnered from voters unable to cast an intelligent ballot would be reduced to a "meaningless charade" (__ AD2d __, __).

While petitioners may have standing to assert this particular claim, their argument nonetheless fails on the merits. Petitioners argue that the Bond Act, when read in conjunction with its implementing legislation, impermissibly authorizes the use of bond proceeds for a multitude of unrelated projects, rendering voters at the November 1996 referendum unable to"intelligently evaluate and appraise the single purpose" of the proposed public debt.

Petitioners' primary support for this argument is People ex rel. Hopkins v Board of Supervisors of Kings County (52 NY 556, 561), an 1873 case in which this Court concluded that a bond act was unconstitutional, and therefore invalid, because its "appropriations [were] in fact many, and their objects many and diverse." When Hopkins was decided, article VII, § 12 of the State Constitution restricted the acquisition of public debt in a number of ways: requiring voter approval of bond issuances, directing that only one bond act at a time could be submitted for such approval and limiting the subject matter of each bond act to a "single work or object." Originally adopted in 1846, these constitutional mandates were intended to stem the extensive, unwise government borrowing practices that had caused serious financial problems in the 1840s.

By the early 1900s, however, it was apparent that the "single work or object" clause was too restrictive and unwieldy. Interpreted as only permitting bond issuances for a single physical structure, the requirement severely hampered the State's ability to build roads, develop parks and supply other desperately needed public works (see, 1915 Revised Record of the New York State Constitutional Convention, vol II, pp. 1295 1299 [remarks of Delegate Alfred E. Smith, et al.]; Poletti Report, vol X, pp. 90 96, supra). Accordingly, at the Constitutional Convention of 1938,

the "single work or object" language was replaced with the current "single work or purpose." That revision was intended to create a more flexible standard and "remove any doubt that may exist as to the power of the State to contract a debt for some single objective that may relate to more than one physical structure or, indeed, as in the case of relief bonds, may not include a physical structure" (see, Journal of the Constitutional Convention of the State of New York, 1938, Doc. No. 3, pp. 6 7).

While broader than its predecessor, the clause still precludes the Legislative and Executive branches from proposing bond issues aimed at "purposes" that are so imprecise as to be essentially generic, thereby allowing funding of a host of projects having no discernible common theme (see, e.g., New York Pub. Interest Research Grp., Inc. v Carey, 59 AD2d at 173 174, 176 177, supra [bond issue for "comprehensive economic development" where the funding was earmarked for four different areas of "development" including industrial development, environmental projects, tourism and transportation was struck down because the areas were "not so naturally and necessarily related to each other as to constitute a single purpose within the meaning of the Constitution"]). Indeed, application of the more flexible "single work or purpose" standard of article VII, § 11 has produced results that are profoundly different from those ensuing from the more rigid requirement in effect when Hopkins was decided. It is now possible, for example, to fund a number of different projects through a single issue, so long as those projects have a common goal (New York Pub. Interest Grp., Inc. v Carey, 59 AD2d at 175 176, supra). Petitioners' reliance on Hopkins, applying article VII, § 12's outdated "single work or object" requirement, is plainly misplaced. [n.3]

The Bond Act at issue in this dispute satisfies the modern constitutional standard. The Act authorizes the creation of State indebtedness for projects in a number of subcategories, all of which are directly related to the single categorical purpose of improving the State's environment. Each of the subcategories safe drinking water, improvement of solid waste facilities, remediation of contaminated properties, enhancement of air and water quality,

and preservation of open spaces, parks and historic sites is naturally and logically related to the stated unitary goal of "preserving, enhancing, restoring and improving" the environment (L 1996, ch 412, §2). Thus, the "single work or purpose" requirement is satisfied.

We note that, contrary to petitioners' argument, the preservation and restoration of parks, open spaces and sites connected with our historical and cultural heritage have long been considered part and parcel of the State's overall environmental management plan. The State Environmental Quality Review Act mandates consideration of "objects of historic or aesthetic significance" that may be affected by a proposed project (ECL 8 0105[6]; see also, 6 NYCRR § 617.4[a][9] [projects having an impact on historic sites are Type I actions]), and the Legislature has specifically linked the State's "invaluable natural and historic resources" as "key components of the environmental and social policy of the state" (Environmental Protection Act of 1993, L 1993, ch 610, § 2, codified at ECL art 54 [emphasis supplied]). Furthermore, section 14.01 of the Parks, Recreation and Historic Preservation Law recognizes that historical, archaeological, architectural and cultural heritage sites are "among the most important environmental assets" the State has. Thus, there is nothing dissonant about including projects related to the preservation of such sites in a Bond Act aimed at conserving and improving the environment.

Inasmuch as the Clean Water/Clean Air Bond Act of 1996 is aimed at a single purpose "preserving, enhancing, restoring, and improving the State's environment" and that purpose is clearly set forth in the Bond Act itself, there is no merit to petitioners' additional contention that that provision fails to satisfy the constitutional requirement that the purpose of the debt be "distinctly specified" in the act (NY Const, art VII, § 11). That the particular projects for which the proceeds were tobe appropriated are listed in a separate legislative enactment is of no legal consequence in this context because the Constitution requires only that the bond act "distinctly specif[y]" the "single work or purpose" of the bond issue; it does not require a listing of

the myriad activities to be undertaken in the service of that work or purpose. Indeed, a rule that would require a detailed enumeration of each and every funded project in the bond act itself would lead to clotted verbiage and unwieldy ballot submissions, thereby defeating the primary purpose of article VII, § 11.

Thus, we conclude that the Bond Act does not violate the "single work or purpose clause" of article VII, § 11 of the State Constitution.

Incorporation by Reference

Petitioners next challenge the Bond Act as violative of article III, § 16 of the State Constitution, which provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." They urge that the Bond Act is constitutionally flawed because it requires reference to separate provisions of its implementing legislation without explicitly incorporating the terms of that enactment.

As with petitioners' first argument, standing is a threshold determination, and here we conclude that they lack standing to maintain this claim. Although voters may have standing to challenge the constitutionality of the Bond Act on the ground that a voter protection dictated by article VII, §11 was denied, it does not follow that they also can challenge the Bond Act under the very different provisions of article III, § 16. Indeed, the purpose of article III, § 16 is not related in any way to the exercise of referendum rights, but rather prevents "the Legislature from incorporating into its acts the provisions of other statutes or regulations which affect public or private interests in ways not disclosed upon the face of the act, and which would not have received the sanction of the Legislature if fully understood by it" (Matter of Medical Socy. of the State of New York v State of New York Dept. of Health, 83 NY2d 447, 452 453 [emphasis supplied]). Thus, the "evil" that article III, § 16 was intended to

address is "the possibility of * * * misapprehension or unawareness" among State legislators, not citizens voting in a referendum (id. at 453).

Nor are we persuaded by petitioners' alternative argument that voter standing exists so long as the referendum requirement of article VII, § 11 applies, even if the underlying challenge to the statute is based upon a different provision of the State Constitution. That position, wholly at odds with the first principle that citizen taxpayers do not as a rule have standing to challenge bond issues, would allow innumerable bond act challenges to be slipped under the blanket of an article VII, § 11 challenge (Wein, 46 NY2d at 400, supra). In that petitioners lack standing, we do not reach the merits of their article III, § 16 claim. Further, petitioners' remaining arguments are either unpreserved or without merit.

Accordingly, on the appeal from the July 17, 1997 order of the Appellate Division, the order should be affirmed, with costs; insofar as it is taken from the March 4, 1997 Appellate Division order, the appeal should be dismissed upon the ground that the order does not finally determine the action within the meaning of the Constitution.

* * * * * * * * * * * * * * * * * * *

On the appeal from the July 17, 1997 order of the Appellate Division, order affirmed, with costs; appeal, insofar as taken from that portion of the March 4, 1997 Appellate Division order that denied appellants' motion to enlarge the issues on appeal, dismissed upon the ground that that part of that Appellate Division order does not finally determine the action within the meaning of the Constitution. Opinion by Chief Judge Kaye. Judges Titone, Bellacosa, Smith, Ciparick and Wesley concur. Judge Levine took no part.

Decided June 9, 1998

Notes

1 Petitioners' notice of appeal referred both to the Appellate Division order affirming the Supreme Court's judgment and to a March 4, 1997 Appellate Division order denying a motion to enlarge the issues on appeal to include arguments pertaining to respondents Pataki, Finnegan and Sheffer that had previously been abandoned. The latter order is nonfinal and, accordingly, so much of petitioners' appeal as pertains to the March 4, 1997 order should be dismissed.

2 In relevant part, article VII, §11 provides that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein."

3 The bond act in Hopkins authorized the creation of State debt to pay for canal construction, general fund deficiencies and the State's "floating indebtedness" objects that have neither a natural connection with each other nor a common unifying purpose. It is thus unlikely that the act would have survived scrutiny under the more flexible "single work or purpose" standard.

Appendix B

In the Matter of Robert L. Schulz et al., Appellants, v. New York State Executive et al., Respondents.

78929

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

233 A.D.2d 43; 660 N.Y.S.2d 881; 1997 N.Y. App. Div.

July 17, 1997, Decided
July 17, 1997, Entered

PRIOR HISTORY: [**1]

Appeal from so much of a judgment of the Supreme Court (Joseph Harris, J.), entered November 8, 1996 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, held that the Laws of 1996 (ch 412) was constitutional.

DISPOSITION: The judgment is affirmed, without costs.

HEADNOTES:

Parties - Standing - Taxpayer's Action Challenging Constitutionality of Environmental Bond Act Petitioners lack standing as citizen-taxpayers under State Finance Law @ 123-b (1) to challenge the constitutionality of the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413). Since State Finance Law @ 123-b (1) specifically excepts from its application "the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by

the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit [**2] corporation", a taxpayer has neither common-law nor statutory standing to challenge the issuance of State bonds or bond anticipation notes. Petitioners' challenge to the constitutionality of State Finance Law @ 123-b (1), raised for the first time in their reply brief, has not been properly raised on appeal and lacks merit in any event. In addition, petitioners lack constitutional voter standing with regard to so much of the proceeding as is predicated on NY Constitution, article III, @ 16, as that provision is not "linked to any voting rights".

Parties - Standing - Voter Standing to Challenge Environmental Bond Act as Violative of "Single Work or Purpose" Constitutional Debt-Incurring Provision Petitioners have separate and independent voter standing to challenge the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413), as violative of NY Constitution, article VII, @ 11, which [**3] provides, inter alia, that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein". An important purpose underlying this constitutional provision was to permit the people of the State to intelligently evaluate and appraise the single purpose of any proposed long-term bonded indebtedness to be incurred by the State and to prohibit the Legislature from lumping several purposes into one bond authorization and thereby obtain voter approval that perhaps could not otherwise be obtained if the relative merit and strength of each purpose were separately evaluated and appraised. Voter standing to sue in an action or proceeding predicated, as here, upon an alleged violation of any of the fundamental requirements of NY Constitution, article VII, @ 11 is therefore necessary to ensure that the State government does not ignore constitutional dictates concerning public financing laws, especially since a citizen-taxpayer lacks standing under

State Finance Law @ 123-b (1) to challenge the issuance of State bonds or bond anticipation notes.

Constitutional Law - Validity [**4] of Statute - Challenge to Environmental Bond Act as Violative of "Single Work or Purpose" Constitutional Debt-Incurring Provision The "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of "preserving, enhancing, restoring, and improving" the quality of the State's "environment" by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413), is not violative of NY Constitution, article VII, @ 11, which provides, inter alia, that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein". The broad environmental projects authorized by the bond act are necessarily and naturally related to one another such that they constitute a single purpose within the meaning of the constitutional provision. As such, the voters were permitted to "intelligently evaluate and appraise" the wisdom of incurring the subject indebtedness for the single over-all purpose of [**5] benefitting the State's environment and, thus, the purpose underlying the "single work or purpose" provision of NY Constitution, article VII, @ 11 was fulfilled.

COUNSEL:

Robert L. Schulz, Queensbury, and John Salvador, Jr., Lake George, appellants pro se.

Dennis C. Vacco, Attorney-General, Albany (Denise A. Hartman of counsel), for New York State Executive, respondent.

Cravath, Swaine & Moore, New York City (Michael R. Siebecker of counsel), for Michael C. Finnegan and another, respondents.

Patricia L. Murray and Peter S. Kosinski, Albany, for New York State Board of Elections, respondent.

JUDGES: Cardona, P. J., White, Casey and Carpinello, JJ., concur.

OPINIONBY: Mercure
OPINION: [*45]
Mercure, J.

In July 1996, the Legislature passed Laws of 1996 (ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment. That law, known as the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412, @ 1; hereinafter the Bond Act), was signed by respondent Governor and approved by the voters at the November 1996 general election. The stated "single purpose" [**6] of the Bond Act was: "preserving, enhancing, restoring, and improving the quality of the state's environment by the accomplishment of projects and the funding of activities by state agencies, public authorities and public benefit corporations, municipalities, and other governmental entities and not-for-profit corporations for and related to protecting, improving, and enhancing the quality of drinking water and enhancement of water bodies; by providing funds for open space, and for parks, historic preservation, and heritage area improvements; by providing funds for solid waste projects; by providing funds for the restoration of contaminated properties, and by providing funds for air quality projects" (Bond Act @ 2). Simultaneously, Laws of 1996 (ch 413) was enacted for the purpose of implementing the Bond Act within the separate categories of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects.

Petitioners commenced this combined proceeding and action seeking, inter alia, a declaration that the Bond Act was unconstitutional as violative of NY Constitution, article VII, @ 11 n1 and article III, [**7] @ 16. n2 In lieu of serving an answer, respondents moved to dismiss the petition/complaint;

petitioners responded with a motion for summary judgment. Supreme Court denied petitioners' summary judgment motion as premature and, addressing respondents' motion, determined that petitioners [*46] lacked standing and that the Bond Act violated neither of the identified constitutional provisions. Petitioners appealed to the Court of Appeals from so much of Supreme Court's order as declared that the Bond Act was not violative of NY Constitution, article VII, @ 11 or article III, @ 16. The Court of Appeals sua sponte transferred the appeal to this Court, and we denied petitioners' subsequent motion to enlarge the issues on appeal.

----------Footnotes----------

n1 As relevant to this proceeding, NY Constitution, article VII, @ 11 provides that: "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein".

n2 NY Constitution, article III, @ 16 provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

----------End Footnotes----------

[**8]

Addressing first the issue of standing, we agree with respondents that petitioners lack citizen-taxpayer standing to mount either of the challenges at issue here. As shall be discussed in some detail, because State Finance Law @ 123-b (1) specifically excepts from its application "the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation", a taxpayer has neither common-law nor statutory standing to challenge the issuance of State bonds or bond anticipation notes (see, Wein v Comptroller of State of N. Y., 46

NY2d 394, 399-400; Schulz v State of New York [hereinafter Schulz I], 193 AD2d 171, 177, affd 84 NY2d 231, cert denied 513 US 1127; Schulz v State of New York [hereinafter Schulz II], 185 AD2d 596, 597, appeal dismissed 81 NY2d 336). Petitioners' challenge to the constitutionality of State Finance Law @ 123-b (1), raised for the first time in their reply brief, is not properly before us (see, Fishman v Beach, 237 AD2d 705, 706; O'Sullivan v O'Sullivan, 206 AD2d [**9] 960) and lacks merit in any event (see, Schulz II, supra, at 597). We also agree with respondents that petitioners lack constitutional voter standing with regard to so much of the proceeding as is predicated on NY Constitution, article III, @ 16, as that provision is not "linked to any voting rights" (Schulz I, supra, at 177; see, Matter of Schulz v State of New York, 81 NY2d 336, 344-347, supra).

We take a different view, however, on the question of petitioners' voter standing to prosecute the claim of violation of NY Constitution, article VII, @ 11. In Matter of Schulz v State of New York (supra,) the Court of Appeals traced the evolution of standing principles as related to "public financing challenges", ultimately addressing the question of whether the Executive and Legislative Branches should "be allowed to erect 'an impenetrable barrier to any
judicial scrutiny of legislative action[s]' " (id., at 345, quoting Boryszewski v Brydges, 37 NY2d 361, 364) and giving a negative response. As noted by that Court, its 1975 decision in Boryszewski v Brydges (supra) [*47] marked a significant departure from the established position that [**10] " 'the constitutionality of a State statute may be tested only by one personally aggrieved thereby' " (Matter of Schulz v State of New York, supra, at 344, quoting St. Clair v Yonkers Raceway, 13 NY2d 72, 76, cert denied 375 US 970), heralding a new era of governmental accountability to taxpayers challenging "enactments of our State Legislature as contrary to the mandates of our State Constitution" (Boryszewski v Brydges, supra, at 362). However, the Legislature's nearly simultaneous enactment of State Finance Law article 7-A, and particularly State Finance Law @ 123-b (1), with its grant of statutory standing to citizen taxpayers but concomitant denial of standing in cases involving "the

authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof", greatly forestalled that effort. Ultimately, in Wein v Comptroller of State of N. Y. (supra), the Court of Appeals was constrained to the conclusion that the effect of the "exception" contained in State Finance Law @ 123-b (1) was to deny both statutory and common-law standing to those challenging the issuance of State bonds or bond anticipation notes (id., at 399-400; [**11] see, New York State Coalition for Criminal Justice v Coughlin, 64 NY2d 660).

However, in Matter of Schulz v State of New York (supra) the Court of Appeals again signaled its "disposition to expand rather than to contract the doctrine [of standing]" (Boryszewski v Brydges, supra, at 363) by recognizing an individual's right to enforce voting rights under NY Constitution, article VII, @ 11 (Matter of Schulz v State of New York, supra, at 346-347). Citing to the public's skepticism for public indebtedness and particularly "borrowing by long-term debt to pay ordinary operating expenses of the government" (id., at 346), the Court recognized that it is the electorate itself, exercising the "constitutional prerequisite of a public referendum", that represents the "ultimate, prudent check-and-balance" (id., at 346). Under the circumstances, "[s]erious concerns accompany a complete cloak of immunity that would preclude access to judicial review of challenged public financing schemes" (id., at 346). Therefore, the Court of Appeals announced the existence of "separate and independent ... voter standing to sue on financing schemes subject to voter referendum [**12] approval" (id., at 347 [citations omitted]) and directed that, to the extent they have been read as a total ban on standing in such cases, Wein v Comptroller of State of N. Y. (supra), New York State Coalition for Criminal Justice v Coughlin (supra) and State Finance [*48] Law @ 123-b should not be followed (see, Matter of Schulz v State of New York, supra, at 347).

Contesting none of the foregoing, respondents nonetheless contend that the Court of Appeals decision in Matter of Schulz v State of New York (supra) should be limited to its particular factual setting, i.e., "the narrow circumstance where plaintiffs

seek to enforce the voter referendum requirement of [NY Constitution, article VII, @ 11]". We are very much bothered by this position, predicated as it is on the assumption that the Executive and Legislative Branches of our State government may safely ignore the constitutional dictates concerning public financing laws so long as they are successful in exhorting the electorate to rubber-stamp their actions. It is worthy of some note that this Court 20 years ago recognized that an important purpose underlying NY Constitution, article [**13] VII, @ 11 was "to permit the people of the State to intelligently evaluate and appraise the single purpose of any proposed long-term bonded indebtedness to be incurred by the State and to prohibit the Legislature from lumping several purposes into one bond authorization and thereby obtain voter approval that perhaps could not otherwise be obtained if the relative merit and strength of each purpose were separately evaluated and appraised" (New York Pub. Interest Research Group v Carey, 59 AD2d 172, 176, revd on other grounds 42 NY2d 527). In any event, we perceive no such limitation
in Matter of Schulz v State of New York (supra). To the contrary, we believe that the Court of Appeals expression of concern over the preexisting "cloak of immunity" (id., at 346) and recognition of the need for "voter standing to sue on financing schemes subject to voter referendum approval" (id., at 347) evidences an intent to permit voter standing in an action or proceeding predicated upon an alleged violation of any of the fundamental requirements of NY Constitution, article VII, @ 11. In our view, a contrary determination would reduce the existing grant of standing to a [**14] meaningless charade.

We shall now address the merits of petitioners' claim that the enactment of the Bond Act violated NY Constitution, article VII, @ 11. It is petitioners' position that, contrary to the express provision of NY Constitution, article VII, @ 11, the Bond Act authorizes a "multiplicity" of works or purposes, none of which are "distinctly specified" therein. In essence, it is petitioners' argument that the stated "single purpose" of "preserving, enhancing, restoring, and improving the quality of the state's environment" is really nothing but a catch-all [*49] phrase.

encompassing a great many purposes and objects, including drinking water, water bodies, open space, parks, historic preservation, heritage areas, solid waste, contaminated properties, air quality, natural resources, debt financing, budget balancing, farmland preservation, agricultural protection, urban cultural parks, economic development, recreation, technology development and transfer, public access to water bodies, operating and maintenance costs and transportation. Although reasonable people may disagree on the applicability of some of the categories identified by petitioners, there can [**15] be no serious question that the "single work or purpose" stated in the Bond Act is a broad one.

The relevant inquiry, then, focuses on the actual breadth the constitutional provision will permit. As originally adopted in 1846 for the purpose of preventing the Legislature from excessive borrowing, the precursor to NY Constitution, article VII, @ 11 required that any proposed long-term indebtedness be approved by the voters and must be for a "single work or object" (1846 NY Const, art VII, @ 12; 1938 Report of NY Constitutional Convention Comm, vol 10, at 81-93; see, New York Pub. Interest Research Group v Carey, 59 AD2d 172, 175, supra). Feeling that the language "single work or object" was too restrictive because it would permit a bond issue for only one physical structure (1915 Revised Record of NY Constitutional Convention, vol 2, at 1295-1299), the provision was amended in 1938 to substitute the word "purpose" for the word "object" (see, New York Pub. Interest Research Group v Carey, supra, at 175). In1977, this Court devised a test for determining whether the liberalized standard had been satisfied: "In order for a bond authorization act to constitute a single [**16] purpose the various components that enter into it must be so necessarily and naturally related that when combined they constitute an entity; something complete in and of itself but separate and apart from other objects" (id., at 176). Applying the test so formulated, it determined that "'comprehensive economic development' " does not constitute a single purpose (id., at 176). By way of example, however, the Court did indicate that "transportation" or "environment" would constitute a single purpose (id., at 176).

Although by no means bound by that dictum, we are of a like mind. Unlike the four sharply dissimilar subcategories considered in New York Pub. Interest Research Group v Carey (supra [industrial and community development, tourism and recreation, conservation and environment, and local transportation access]), here the major divisions of the Bond Act, i.e., [*50] safe drinking water, improvement and enhancement of water quality, improvement of solid waste facilities, restoration of contaminated properties and improvement and enhancement of air quality, are necessarily and naturally related to one another such that they constitute an entity complete [**17] in and of itself (see,id., at 176). As such, we conclude that the voters were permitted to "intelligently evaluate and appraise" the wisdom of incurring the subject indebtedness for the single over-all purpose of benefitting the State's environment (id.) and, thus, the purpose underlying the "single work or purpose" provision of NY Constitution, article VII, @ 11 was fulfilled.

For the foregoing reasons, we conclude that Supreme Court did not err in its declaration of constitutionality.

Cardona, P. J., White, Casey and Carpinello, JJ., concur.

Ordered that the judgment is affirmed, without costs.

Appendix C

State of New York Supreme Court
County of Albany

REVISED
DECISION AND ORDER
INDEX NO. 6353-96
RJI 01-96-04799

ROBERT L. SCHULZ and JOHN SALVADOR, JR.
Plaintiffs-Petitioners,

- against -

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and MICHAEL FINNEGAN, CHIEF COUNSEL TO THE GOVERNOR; and GARY SHEFFER, SPOKESMAN FOR THE GOVERNOR; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, MAJORITY LEADER OF THE SENATE; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN CHAIRMAN, THOMAS WILKEY, EXECUTIVE DIRECTOR,

Defendants-Respondents.

APPEARANCES:

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HARRIS, J.

THE FACTS

On August 1, 1996, Governor Pataki signed into law the Clean Water/Clean Air Bond Act of 1996. (Chapter 412 of the Laws of 1996). If approved by the voters on the November ballot, the Bond Act will authorize the State to borrow $1.75 billion in State debt for the preservation, enhancement, restoration and improvement of the State's environment; $355 million for safe drinking water projects; $790 million for projects relating to the improvement and enhancement of water quality; $175 million for initiative designed to improve solid waste facilities; $200 million for the investigation and renovation of contaminated properties; and $230 million for the improvement and enhancement of air quality. (Bond Act. Sect. 4).

At the same time as the legislative passage of the Bond Act, the Legislature enacted Chapter 413 of the Laws of 1996, which as article 56 of the Environmental Conservation Law implements the Bond Act and appropriates funds in the amounts specified in the Bond Act, with a separate title for each category identified in the Bond Act. (Laws of 1996, sec. 1). This has been the traditional manner of appropriating funds to implement the purpose for which bond acts in the State of New York have been enacted.

On September 19, 1996 plaintiffs commenced a lawsuit raising seven causes of action, (Schulz v New York State Executive, Index No. 5852-96 [Albany County Supreme Court]), all of which related to the Bond Act (Chapter 412) and its implementation law (Chapter 413), except Count Five (which alleged that sections 207 to 216 of the Farmer's Protection and Farm Preservation Act of 1996 (Chapter 309 of the Laws of 1996, hereinafter referred to as the "Farm Act") violates plaintiffs' equal protection rights because it provides an income tax credit to farmers.

First blood was let when plaintiffs in that action moved by order to show cause in Supreme Court (Harris, J.) for a preliminary injunction and final judgment: enjoining the Governor, Michael Finnegan (on leave of absence as Counsel to the Governor), and Gary Sheffer (on leave of absence from the Department of Environmental Conservation) from campaigning for the Bond Act; declaring the Bond Act (Chapter 412) and its related implementation law (Chapter 413) unconstitutional; directing the removal of the Bond Act from the ballot; and for diverse reasons declaring the Bond Act unconstitutional. In the interim, plaintiffs requested a temporary restraining order prohibiting the Governor and defendants Finnegan and Sheffer from campaigning for the Bond Act. After hearing extensive arguments, Justice Harris denied the Temporary Restraining Order and scheduled the motion for a preliminary injunction and judgment to be heard on September 30, 1996, upon which date, it was assigned to Justice Hughes.

Thereafter, the judicial battle waged on in a convoluted and haphazard fashion, through no fewer than nine federal and state court judges (including the Appellate Division, Third Dept.), all of whom denied plaintiffs' request for temporary equitable relief, but not on the merits. Finally, on October 16, 1996, plaintiffs suddenly discontinued the first state action in its entirety, and contemporaneously filed a new action containing only the Bond Act claims advanced in the first action. The temporary restraining order accompanying the new action, seeking to bar defendants Pataki, Finnegan and Sheffer from advocating in favor of the Bond Act (relief denied just five days earlier by the Appellate Division), was, like the seven other judges before him, denied by Justice Teresi, and the matter returned to Justice Harris from which it had initially come, to be decided on the merits. Plaintiffs move for a preliminary injunction and for summary judgment to in effect declare the Bond Act unconstitutional, remove same from the ballot, and to prohibit defendants from advocating in favor said Act.

OBJECTIONS IN POINT OF LAW

Defendants have not yet answered the complaint and have interposed the follows objections in point of law:

1. That the action is untimely commenced. CPLR 3211.
2. The plaintiffs-petitioners lack standing to challenge the matters they are attempting to challenge. CPLR 3211(a)(3).
3. The claims plaintiffs-petitioners make are not justiciable. CPLR 3211(a)(7)
4. The issue raised by plaintiffs-petitioners are not ripe for judicial review.
5. The complaint fails to state a cause of action. CPLR 3211 (a)(7)
6. Plaintiffs-petitioners have failed to obtain personal jurisdiction over defendants-respondents. CPLR3211(a)(8)

THE LAW

Re: Plaintiffs' Motion for Summary Judgment

A motion for summary judgment can be made only after joinder of issue, which occurs when the answer has been served. A motion fur summary judgment may not be filed before joinder. CPLR 3212(a); D. Siegel, New York Practice, sec. 279 (2nd ed. 1991). In the instant action, inasmuch as no answer has been served, and is not yet due, the motion for summary judgment is premature; this result is the same whether the proceeding is an action for a declaratory judgment or an Article 78 proceeding (See: CPLR 7804(f).

Accordingly, plaintiffs motion for a summary judgment must at this point be denied.

Further, CPLR 3212(b), gives the court, where a defense "shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" to do so, even in the absence of a cross-motion. An analysis of all the facts of this case, from all papers submitted, and as hereinafter set forth, shows that there are no disputed questions of fact - only issues of law - clearly supporting the positions of the defendants and antithetical to the positions of the plaintiff - and accordingly, summary judgment is granted to defendants dismissing the complaint herein.

Re: Statute of Limitations and the Defense of Laches

For reasons stated in the complaint, plaintiffs aver that defendants have no authority to place the Bond Act on the November ballot and ask that the State Board of Elections strike the proposition from the ballot.

However, section 16-104(3) of the Election Law provides:

> "The wording of the abstract or form of submission of any proposed amendment, proposition or question may be contested in a proceeding instituted by any person eligible to vote on such amendment, proposition or question."

Section 4-108(1) (a) of the Election Law requires that whenever a proposition or question is to be submitted to the People for their approval statewide, the State Board of Elections shall transmit to each County Board of Elections a certified copy of the text of the proposition or question and a statement of the form in which it is to be submitted t least three months before the election.

In the instant case the election is to be held November 5, 1996; plaintiffs admit that the certified text and form of submission of the proposition was sent by the State Board of elections to each County Board of Elections on August 2, 1996.

An action to strike from the ballot a proposition, or to change the wording thereof must be commenced within fourteen (14) days of the last day to certify the wording on the ballot. Election Law, sec. 16-104(3) - in this case, August 19, 1996. But the initial proceeding herein was not commenced until September 19, 1996 and the instant proceeding was commenced on October 16, 1996, each far in excess of the "14 day" limit herein set by Election Law, sec. 16-104(3) - to wit, August 19th (August 5 + 14). Accordingly, this proceeding as against the State Board of Elections, is untimely, and barred by the Statute of Limitations.[1]

The request to strike the Bond Act from the ballot is also barred under the doctrine of laches, as pled by the defendants, Plaintiffs seek an equitable remedy; however, the Courts of New York will not provide an equitable remedy where such remedy itself works an inequity. It is unfair at this late date to deprive the People of the State of New York of an opportunity to vote on this referendum. The inequity inherent in plaintiffs' behavior is especially apparent when one considers the repeated applications by plaintiffs to innumerable justices for the same relief. Forum shopping peaked when plaintiffs applied to Justice Teresi for temporary relief against the Governor on October 16, 1996

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[1] See, possible impact of this holding upon the holding of *New York Public Interest Research Group (NYPIRG) v Carey*, 42Nyd 527 (1977) respecting the prohibition of advisory opinions.

without informing the Court or defense counsel that precisely the same relief was then being sought in Federal Court.

So much of the complaint as seeks to strike the Bond Act from the ballot, or change the form of the ballot in any respect is dismissed as untimely. CPLR 3211 (a)(5).

Re: Issues Relating to the Question of Advisory Opinions

Courts may not issue advisory opinions. The Court of Appeals in New York Public Interest Research Group v Carey, 42 N.Y. 2d 527 (1977) held that a request for a declaratory judgment is premature if the underlying future event is beyond the control of the parties and may never occur, stating:

> "the same principle applies when a party challenges a statute which has not become effective. "[U]ntil the statute or ordinance is passed", a declaratory judgment "would be premature" (Bouchard, Declaratory Judgments, p. 63; cf., Matter of McCabe v Voorhis, 243 NY 401, 411-412).

For instance, here, if the voters do not approve the proposition all the determinations which the courts have made in this case would be merely of abstract interest and moot. In addition, where the final approval rests with the voters, "the hazard and inconvenient nature of such action, taken in the necessary haste of disposing of preelection contests, makes it wise and expedient for the courts to refuse to intervene in advance of some threatened action" (Matter of McCage v Voorhis, supra, p. 412).

However, NYPIRG v Carey, supra, requires careful scrutiny, a defining element in NYPIRG is the absence therein of the New York State Board of Elections as a party defendant, which is not the case here. In the instant case the State Board of elections is a party defendant.

With respect to that happenstance, the Court of Appeals in NYPIRG, at p. 531; states: "That is not to say that the courts may never consider the validity of proposed legislation. This has been done on several occasion, although with reluctance and then only incidentally to resolve a dispute as to whether the proposition should be placed or remain on the ballot (see, e.g., Matter of Tierney v Cohen, 272 NY 33: Johnson v Etkin, 279 NY 1; Matter of Stroughton v Cohen, 281 NY 343; Matter of Atward v Cohen 291 NY 484.)

"These are not advisory opinions. The effect of the Court's determination in those cases does not depend on the outcome of the election. On the contrary, those orders have the immediate and practical effect of determining whether the proposition should be submitted to the voters, or whether all the expense and human effort involved would be wasted because of fatal defects in the law." NYPIRG, supra, p. 532.

A gordian knot however is created in the case sub judice inasmuch as, even though the State Board of elections was served as a party defendant, the Court has held that such service was time-barred, and in effect the State Board of elections is no longer a party defendant, and never was. Thus, if the Courts reading respecting the statute of limitation is correct, this issue is premature and the Court has no authority to strike the bond act from the ballot, and must abstain from deciding this issue, which the court does at this time.

Re: Impact of Article VII, Section 11 of the New York Constitution

Under Article VII, Section 11 of the New York Constitution, "no debt shall be hereafter contracted by or on behalf of the state unless...such debt shall be authorized by law, for some single works or purpose, to be specifically specified therein.

Plaintiff alleges that the Bond Act herein violates this provision because, they charge, it relates to multiple works and purposes.

One need not be a Rhodes scholar to determine that this argument is meritless. In order to preserve a forest, each tree therein need not be armed by its own bond act. Every category of proposed expenditure (see Chapter 413) readily lends itself to the generic heading "environment." This is all that is needed. This issue is resolved with crystal clarity in favor of the position of the defendants by New York Public Interest Research Group, Inc. (NYPIRG) v Cary, 59 A.D. 2d 172 (3rd Dept. 1977) rev'd on other grounds, 42 N.Y. 2d 527 (1977). Said the Third Department:

> "In order for a bond authorization act to constitute a single purpose the various components that enter into it must be so necessarily and naturally related that when combined they constitute an entity; something complete in and of itself but separate and apart from other objects."[2] [3],

Re: Does the Bond Act Violate Article III, Section 16 of the New York Constitution?

Article III, Section 16 of the New York Constitution recites: "...no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof,

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[2] The derivation of the term "purpose" arises from the 1938 New York Constitutional Convention wherein it was substituted for the word "object" to remove any doubt as to the power of the state to control a debt for some single objective that may relate to more than one physical structure." (See: Committee on State Finances and Revenues of the Constitutional Convention, vol II, pp. 798-799).

[3] The Third Department in NYPIRG, 59 AD2d 172, at p. 176, clearly shows the proposed bond authorization act [in NYPIRG] is not for a single purpose such as Transportation or Environment [emphasis added] but rather is for four separate and disparate purposes divided into functional categories. The broad term "comprehensive economic development" does not, as defendant contends, constitute a single purpose..."

shall be applicable, except by inserting it in such act." (Frequently referred to as incorporation by reference").

In Medical Society of the State of New York v State of New York Department of Health, 83 N.Y. 2d 447, 452 (1994), the Court of Appeals stated that "...incorporation by reference is not prohibited in all instances."

The purpose of section 16 is "to require bills introduced in the legislature to be presented in such form and their essential provisions expressed in such language that the effect of the proposed enactment might be understood by legislators of reasonable intelligence." People ex rel Everson v Lorrilard, 135 N.Y. 285, 291 (1892).

Again, in Medical Society of the State of New York, supra, at p. 453, the Court of Appeals stated:

> "...where a statute creates rights or duties or imposes burdens, and the provisions of another statute are referred to as a means of formally executing the provisions of the first statute, the constitutional proscription is not violated."

Chapter 413 is so explicit and detailed and clear-cut that it would be frivolous to consider it beyond the token of any legislator of reasonable intelligence, and thus the constitutional proscription is not violated.

Re: Other Issues of Standing

In Society of Plastics Industry v County of Suffolk, 77 N.Y. 2d 761 (1991), the Court of Appeals announced that the threshold inquiries for determination of "standing" are whether the person asserting standing asserts a specific injury in fact, different from injury to the public in general, or a generalized grievance more appropriately addressed by the representative branches of government, and whether the interest or injury asserted falls

within the zone of interest protected by the principle the litigant invokes.

Insofar as plaintiffs assert taxpayer standing, they cannot rely on section 123-b(1) of the State Finance Law, which does not provide for standing to challenge bond acts. Plaintiffs otherwise lack standing relating to many of their claims because their "injury" respecting the Bond Act is no different from that of any other member of the public.

Re: Advocacy of the Bond Act by Governor Pataki and Messrs. Finnegan and Sheffer - Impact of Article VII, Section 8 of the New York Constitution

Plaintiffs allege that advocacy of the Bond Act by Governor Pataki and Messrs. Finnegan and Sheffer violates Article VII, section 8 of the New York Constitution, which provides:

> "The money of the State shall not be given or loaned to or in aid of any private corporation or association, or private undertaking, nor shall the credit of the State be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking."

Plaintiffs admit that neither the Governor, nor Messrs. Finnegan and Sheffer, have used, or will be directly using public moneys to advocate in favor of the Bond Act. Such "public funds" as plaintiffs claim have been used for a public undertaking are identified only as public assistance in the form of the Governor's "tax-supported time."

This is meritless. Article VII, section 8 of the New York Constitution does not cast a cloak of silence over a Governor on matters of significant public concern. Advocacy is not prohibited - merely the direct use of public or taxpayer funds or resources in furtherance of that advocacy. (See: Phillips v Mauer, 67 NY2d 672 [1986]; Schulz v State of New York, 86 NY2d 225; cert.

Denied. 116 S.Ct. 382 [1995]; Stern v Kramarsky, 84 Misc 2d 447 [1975]; Schulz v McCall, 632 NY2d 883 [Third Dept. 1995]); Schulz v New York, 148 Misc 2d 677, 678, affd 175 AD2d 356 [3rd Dept. 1991]). In Schulz v State of New York, supra, 148 Misc 2d 677, the Court specifically rejected plaintiffs' argument that public officials should be prohibited from speaking in favor of a Bond Act, absent expenditures of taxpayer funds; "Finally, petitioners contend that respondents should be enjoined from issuing any public statements on this Bond Act. This Court can find no legal authority that prohibits public officials to express their views on matters of public concern. Public officials have the right of free speech, and in fact, have a responsibility to express their views on any issue which affects the electorate they serve."

As set forth above, it appears that the only State "resources" or "public assistance" plaintiffs can identify is the Governor's "tax-supported time."

Nothing in Article VII, sec. 8 of the New York Constitution mandates that when a Governor speaks on a public issue he must don a false beard and a false mustache and speak incognito, just as nothing in Article VII, sec. 8 mandates that a Governor spend his afternoons at the movies. A Governor was elected to govern; he was elected to formulate a program he considers to be in the best interests of the People, and to advocate acceptance of that program.

Nor in any meaningful sense does advocacy by a Governor on a public issue without the expenditure of public funds constitute a loan or gift of the State's "credit" in aid of any private undertaking.

The same arguments that permit advocacy on the part of the Governor herein permit advocacy on the part of Messrs. Finnegan and Sheffer. They are on leave of absences approved by the New York State Ethics Commission; they neither receive nor expend any public moneys or resources; their advocacy of the Bond Act

is financed solely from private funds raised by the private "not for profit" Clean Water/Clean Air Bond Act Committee.

Re: Miscellaneous

The Court has examined all other issues and arguments raised by plaintiffs and finds them without merit.

CONCLUSION

For all the reasons heretofore stated - whether upon substantive matters, or procedural matters including issues of standing, ripeness, justiciability, and advisory opinions, and all other issues raised - the complaint herein is dismissed. Summary judgment is granted to defendants; motion for a preliminary injunction is denied as is plaintiffs' motion for summary judgment; the Bond Act will remain on the ballot[4]; and plaintiffs' motion to restrain the defendants from advocating in favor of the Bond Act is also denied.

All papers, including this decision and order, are being returned to the Attorney General. The signing of this decision and order shall not constitute entry or filing under CPLR section 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This decision shall constitute both the decision and the order of the Court.

SO ORDERED!

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[4] As of this writing, Election Day 1996 (November 5, 1996) is over; the referendum on the Bond Act was overwhelmingly supported by the electorate and the Bond Act passed. Thus, some of the issues that were premature before the election are no longer so and are nor fully justiciable.

DATED: ALBANY, NEW YORK
NOVEMBER 7, 1996

JOSEPH HARRIS, J.S.C.

Papers Considered:

The order to show cause dated October 16, 1996;
The complaint/petition with exhibits verified October 16, 1996;
The summons and RJI dated October 16, 1996;
The affidavit of Gary Sheffer sworn to October 21, 1996, with exhibits;
The affidavit of Michael Finnegan sworn to October 21, 1996, with exhibits;
The notice of cross-motion to dismiss of defendants Michael C. Finnegan and Gary Sheffer dated October 22, 1996;
The notice of cross-motion to dismiss of defendants Pataki, Silver and Bruno dated October 22, 1996;
The affirmation of Darren O'Connor dated October 22, 1996;
The amended notice of cross-motion to dismiss of defendant Pataki, Silver and Bruno dated October 23, 1996;
The notice of motion to dismiss of the Board of Elections defendants dated October 23, 1996;
The affidavit of Peter S. Kosinski, sworn to October 23, 1996;
The affidavit of Robert L. Schulz and John Salvador, Jr., sworn to October 24, 1996, with exhibits;
The affidavit of Robert L. Schulz and John Salvador, Jr., sworn to October 25, 1996, with exhibits; and
The letter of Robert L. Schulz dated October 29, 1996, with exhibits.

Appendix D

United States Court of Appeals for the Second Circuit, April 6, 1998

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of April, one thousand nine hundred and ninety-eight.

PRESENT:

HON. WILFRED FEINBERG,
HON. GUIDO CALABRESI,
HON. MYRON H. BRIGHT,*
Circuit Judges.

ROBERT L. SCHULZ and JOHN SALVADOR, Jr.
Plaintiffs-Appellants,

SUMMARY ORDER

v. # 97-7952

NEW YORK STATE EXECUTIVE, et al.,
Defendants-Appellees.

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*The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

For Appellants: ROBERT L. SCHULZ, *pro se*, Queensbury, NY.

For Appellees: FRANK K. WALSH, for DENNIS C. VACCO, Attorney General of the State of New York (PETER H. SCHIFF, of counsel), Albany, NY, *for State Appellees*.
FREDERICK A. O. SCHWARZ, Jr., Cravath, Swaine & Moore, New York, NY, *for Appellees Finnegan and Sheffer*.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*) and was argued.

UPON CONSIDERATION WHEREOF, it is ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Robert L. Schulz, joined by co-plaintiff-appellant John Salvador, Jr., brings this federal action to challenge various laws of the State of New York. Finding their appeal meritless, we affirm the judgment of the district court dismissing their suit.

The complaint in the district court made a myriad of challenges to New York's Clean Water/Clean Air Bond Act of 1996 ("Bond Act"), the Farmer's Protection and Farm Preservation Act ("Farm Act"), and various "General Government Appropriations" bills (including Section 123-b(1) of the New York State Finance Law), as well as claims against state actors who spoke in favor of passing these bills, and a general assault on the proposed New York constitutional convention. The legal theories advanced to support these claims ranged from the frivolous -- for example, that the Farm Act, by treating non-farmers differently from farmers, violates the Equal Protection Clause of the Fourteenth Amendment -- to the exotic -- for instance, that the delegation of authority to the New York State

Constitutional Convention offends the general constitutional principle of "government based upon the consent of the governed."

Among the several grounds upon which we might affirm the district court, *see Alfaro Motors, Inc. v Ward*, 814 F.2d 883, 887 (2d Cir. 1987), we select standing. Appellants simply have not shown the requisite injury for almost all of their claims. "Abstract" and "conjectural" injuries will not support standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Moreover, disgruntled taxpayers may not rely on their remittance of taxes to confer standing, unless they pursue "a 'good-faith pocketbook action,' in which the taxpayer alleges injury to 'a direct and particular financial interest'." *Board of Educ. V. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110 (2d Cir. 1995) (citations omitted).[5]

The only law that appellants might conceivably have standing to challenge is the Farm Act, as they allege actual financial injury by not being able to avail themselves of the tax credits provided by that Act to farmers. We need not decide the matter, however, because their arguments against the Farm Act

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[5] On appeal, appellants have raised Establishment Clause claims. In their complaint, appellants listed numerous appropriations the State made to various religious and non-religious organizations. They now contend that these appropriations are the use of public funds for religious purposes and thus violative of the Establishment Clause. Appropriation of government funds to religious organizations does not constitute a per se violation of the Establishment Clause. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), appellants must show that the payments have a religious purpose, have the primary effect of advancing religion, or involve an excessive entanglement between the state and religion. *See id.* At 612-13. Appellants neglected to plead any facts or explain in any other way how the appropriations enumerated in their complaint meet any of the requirements established under *Lemon*. Thus, they failed to state a proper claim.

Furthermore, appellants cannot now, for the first time on appeal, raise their Establishment Clause arguments. Because failure to consider this claim will not "result in a possible miscarriage of justice," we decline to address these untimely arguments. *Lionel Corp. v. Civale & Trovato, Inc.*, 29 F.3d 88, 92 (2d Cir. 1994) (internal quotation marks and citation omitted).

lack merit. First, the Privileges and Immunities Clause does not permit individuals to pursue actions against their own states. *See Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982). Second, the Guarantee Clause does not contemplate the action plaintiffs seek to pursue -- a general exhortation to "rei[]n in" the un-republican government actors of the State of New York -- as was painstakingly explained by the district court. Finally, the Equal Protection Clause does not countenance "non-farmers" as a suspect class (and we decline the invitation to confer that that special status upon them at this time). And, under rational basis review, we agree with the district court that "the support of farmers through tax relief" is an adequate reason for the adoption of this law by the New York legislature.

As for the "government by the consent of the governed claim" which involves a passionate attack on the proposed implementation of the New York State constitutional convention delegation, and a plea for some form of injunctive relief, we cannot say that it gives rise to a sufficiently clear and distinct federal right that might serve as the predicating interest to a cognizable action under 42 U.S. C. Section 1983. *See West v. Atkins*, 487 U.S. 42, 48 (1988). Nor would we find it appropriate for a federal court to invade a state's constitutional affairs in the manner suggested by plaintiffs.

We have analyzed the entire record carefully and cannot find any basis for reversing the court below. We also note that the district court correctly declined to exercise its supplemental jurisdiction over appellants' pendent state-law claims. Accordingly, we order the judgment of the district court to be

AFFIRMED.

For The Court
GEORGE LANGE III
By: Lucille Carr

Appendix E

United States District Court
Northern District of New York
April 12, 1997 Decided
April 14, 1997 Filed

ROBERT L. SCHULZ and JOHN SALVADOR, JR.,
Plaintiffs,

-against-

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; MICHAEL FINNEGAN, Chief Counsel to the Governor, and GARY SHEFFER, Spokesman for the Governor; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, Speaker of the Assembly, and JOSEPH BRUNO, Majority Leader of the Senate; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, Chief Judge; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, Chairman, THOMAS WILKEY, Executive Director; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, Chairman,
Defendants.

96-CV-1595

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

960 F. Supp. 568; 1997 U.S. Dist. LEXIS 5218

April 12, 1997, Decided
April 14, 1997, FILED

DISPOSITION: [**1] Plaintiffs' Complaint DISMISSED. Plaintiffs' federal claims dismissed with prejudice. Plaintiffs' state law claims dismissed without prejudice.

COUNSEL: Appearances:

ROBERT L. SCHULZ, Plaintiff, Pro se, Queensbury, NY.
JOHN SALVADOR, JR., Plaintiff, Pro se, Lake George, NY.

For Pataki, State Legislature, Unified Court System, defendants: DARREN O'CONNOR, ESQ., DENNIS C. VACCO, Attorney General, Albany, NY.

For Finnegan, Sheffer, defendants: FREDERICK A.O. SCHWARZ, ESQ., CRAVATH, SWAINE & MOORE, New York, NY.

JUDGES: HON. THOMAS J. McAVOY, Chief U.S. District Judge

OPINIONBY: THOMAS J. McAVOY

OPINION: [*570] MEMORANDUM-DECISION and ORDER

The present dispute concerns no less than twelve causes of action challenging, inter alia, the constitutionality of New York's Clean Water/Clean Air Bond Act; New York's Farm Preservation Act; section 123-b of New York's Finance Law; New York's procedure for choosing delegates to its constitutional conventions; and a number of the New York State Legislature's "Member Items." Defendants include the Governor of New York, the Governor's advisors, the New
York State Legislature, key legislators, the New York Unified Court System, and the New York State Board [**2] of Elections. Plaintiffs Robert Schulz and John Salvador, although appearing pro se, are frequent litigators in federal and state court.

Not surprisingly, this case has a long and convoluted history. Plaintiffs' initial foray began on September 19, 1996, in Albany County Supreme Court, and continued to the Appellate Division, Third Department, where [*571]

Plaintiffs' request for a temporary restraining order, barring defendants Pataki, Finnegan, and Sheffer from advocating in favor of the Clean Water/Clean Air Bond Act, was rejected. See Schulz v. New York State Executive, Index No. 5852-96 (Alb. Cty. Sup. Ct. 1996). On October 16, 1996, Plaintiffs discontinued their first state court action and commenced a second state court action seeking similar relief; on October 25, 1996, Justice Teresi denied Plaintiffs' second application for preliminary relief. See Schulz v. New York State Executive, Index No. 6353-96 (Alb. Cty. Sup. Ct. 1996).

Not content to fight this battle on merely one front, Plaintiffs hurried to federal court on October 13, 1996, seeking (1) a declaration that certain actions by the defendants violated the New York State and the United States Constitutions, and [**3] (2) for a temporary restraining order or preliminary injunction enjoining the New York Legislature and Executive from implementing Chapters 412 and 413 of the Laws of 1996 (the "Clean Water/Clean Air Bond Act" hereinafter "Environmental Bond Act").

On October 17, 1996, this Court denied Plaintiffs' application for temporary relief and denied Plaintiffs' attempt to have their motion heard on an expedited basis. See Memorandum-Decision & Order dated October 18, 1996. On October 23, 1996, while the present matter was pending before this Court, Plaintiffs requested for the second time, and were denied, a Temporary Restraining Order in their state court action. Finally, on November 1, 1996, Justice Harris dismissed Plaintiffs' state action in its entirety. See Schulz v. New York State Executive, Index No. 6353-96 (Alb. Cty. Sup. Ct. 1996).

A. The Claims

Although Plaintiffs are concerned with their government's profligate spending, they appear to be less concerned with, or simply incognizant of, the costs associated with their litigating these issues before nine federal and state court judges.

Plaintiffs' Complaint contains both federal and state law causes of action. Although [**4] the Complaint is a model of obfuscation, it appears that Plaintiffs are attempting to implicate four provisions in the United States Constitution: the Constitution's guarantee of a "Republican Form of Government," see Article IV section 4; the "privileges and immunities" clause of the Fourteenth Amendment; the "equal protection" clause of the Fourteenth Amendment; and the First Amendment.

The gravamen of Plaintiffs' state law claims is that the Environmental Bond Act violates the New York State Constitution because the debt it authorizes is not for a "single work or purpose," and its purposes are not "distinctly specified therein." N.Y. CONST. art. VII, @ 11. Plaintiffs also assert that defendants Pataki, Finnegan, and Sheffer violated the New York State Constitution by using public funds and public credit to "exhort the electorate to vote 'yes' on the Bond Act." (Pltfs' Mem. of Law at 44.)

Presently before the Court are Defendants' Motions to Dismiss.

II. DISCUSSION

Initially, it is appropriate to identify certain basic principles that limit the power of every federal court. Unlike their state counterparts, federal courts are not courts of general jurisdiction; [**5] "they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Bender v. Williamsport Area School Dist., 475 U.S. 534, 540, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986); see also Marbury v. Madison, 5 U.S. 137, 173-180, 2 L. Ed. 60 (1803). For example, prior to 1875, see Act of March 3, 1875, c. 137, 18 Stat. 470, federal courts did not even have original jurisdiction over actions that arose under the Constitution or laws of the United States. See, e.g., Hague v. Committee for Indus. Organization, 307 U.S. 496, 507, 59 S. Ct. 954, 960, 83 L. Ed. 1423 (1939). As Chief Justice Ellsworth succinctly noted in 1799:

Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute and regulate the power? The notion has frequently [*572] been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs [**6] to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant. Turner v. Bank of North America, 4 U.S. 8, 8 1 L. Ed. 718 (1799).

Although there is no consensus as to the framers' intent in creating federal courts of limited jurisdiction, early cases point to a fear of an all powerful federal sovereign. See, e.g., Turner v. Bank of North America, 4 U.S. 8, 8, 1 L. Ed. 718 (1799) ("Congress knew that the English courts have amplified their jurisdiction through the medium of legal fictions; and it was readily foreseen, that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper might be drawn into the federal courts."). Indeed, federalism concerns are plainly implicated in more recent cases as well. In Healy v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 [**7] (1934), the Supreme Court stated:

The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.

Healy, 292 U.S. at 270, 54 S. Ct. at 703 (citations omitted); see also Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379-380, 408, 79 S. Ct. 468, 483-484, 498-499, 3 L. Ed. 2d 368 (1959) (Brennan, J., dissenting and concurring).

Consequently, subject-matter jurisdiction is both an Article III as well as a statutory requirement. Certain legal consequences necessarily follow from this observation. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, see California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972), principles of estoppel [**8] do not apply, see American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S. Ct. 534, 541-542, 95 L. Ed. 702 (1951), and a party does not waive the defense by failing to challenge jurisdiction early in the proceedings. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982); Turner, 4 U.S. at 8 ("Silence, inadvertence of consent cannot give jurisdiction, where the law denies it."). Similarly, a court, including an appellate court, must raise lack of subject-matter jurisdiction on its own motion. "The rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1884).

Accordingly, a federal district court cannot adjudicate every allegation of injustice, no matter how emphatically [**9] a party may argue to the contrary. Moreover, absent a viable basis of federal jurisdiction, a federal court is precluded from entertaining purely state law causes of action. Although under 28 U.S.C. @ 1367(a) district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," a

district court cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction. [*573] See, e.g., In re Joint Eastern and Southern Dist. Asbestos Litig., 14 F.3d 726, 730 n.2 (2d Cir. 1993) ("the court may not exercise supplemental jurisdiction over claims unless the court has 'original jurisdiction' over at least one of the plaintiff's claims"); Cushing v. Moore, 970 F.2d 1103, 1106 (2d Cir. 1992).

Here, Defendants assert that this Court lacks subject matter jurisdiction to entertain Plaintiffs' claims and that in the alternative, Plaintiffs' claims should be dismissed because they are without merit. "While distinguishing between a dismissal for lack of subject matter jurisdiction [**10] under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice." Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996).

Not surprisingly, jurists have long struggled with the difficulty of distinguishing, in federal question cases, between dismissal for lack of subject matter jurisdiction and dismissal on the merits. Justice Holmes described the differences in a federal question case in The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716 (1913):

If it should appear that the plaintiff was not really relying upon [a federal statute] for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, and in the latter the jurisdiction would not be denied, except possibly in form.

228 U.S. at 25, 33 S. Ct. at 411-12 (citations omitted).

Distinguishing the basis of dismissal is particularly difficult in cases involving federal question jurisdiction under 28 [**11] U.S.C. @ 1331, where the very statute that creates the cause of action often confers jurisdiction as well. Justice Black framed the analysis as follows:

If the court [exercises] its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946) (citations and footnote omitted).

Although the federal courts have followed a general practice of granting jurisdiction in most cases and dismissing for lack of subject matter jurisdiction only under narrow circumstances, see Spencer v. Casavilla, 903 F.2d 171, 173 (2d Cir. 1990); Goldman v. Gallant Sec., Inc., 878 F.2d 71, 73 (2d Cir. 1989) (per curiam); Lewis v. Knutson, 699 F.2d 230, 237 (5th Cir. [**12] 1983), a court must nevertheless dismiss for lack of subject matter jurisdiction--even if a federal claim is asserted on the face of the complaint--where the federal question "is so plainly insubstantial as to be devoid of any merits and thus [does] not present[] any issue worthy of adjudication." Giulini v. Blessing, 654 F.2d 189, 192 (2d Cir. 1981); see also Nowak, 81 F.3d at 1188; Town of West Hartford v. Operation Rescue, 915 F.2d 92, 100 (2d Cir. 1990).

As the Second Circuit has stated, the test "is whether the federal . . .claim was so insubstantial, implausible, or otherwise completely devoid of merit as not to involve a federal controversy." IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir. 1993); see also AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 152-53 (2d Cir. 1984) ("when the contested basis of federal jurisdiction is also an element of plaintiff's asserted federal claim, the claim should not be dismissed for want of jurisdiction except when it appears to be immaterial and made solely for the purpose of obtaining

jurisdiction or where such a claim is wholly insubstantial and frivolous") (internal quotation marks [**13] omitted).

Accordingly, the Court will initially focus on Plaintiffs' federal claims, and with the [*574] foregoing standard in mind, will address Defendants' Motions to Dismiss.

A. Motion To Dismiss

Rule 12 of the Federal Rules of Civil Procedure provides that a cause of action shall be dismissed if the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Furthermore, a case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the court lacks the statutory or constitutional power to adjudicate the case.

In analyzing a motion to dismiss, the facts alleged by the plaintiff are assumed to be true and must be liberally construed in the light most favorable to the plaintiff. See, e.g., Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911, 118 L. Ed. 2d 548, 112 S. Ct. 1943 (1992). While the court need not accept mere conclusions of law, the court should acceptthe pleader's description of what happened along with any conclusions that can reasonably be drawn therefrom. See Murray v. City of Milford, 380 F.2d 468 (2d Cir. 1967).

Furthermore, when a party makes a motion [**14] to dismiss, the court will limit its consideration to the facts asserted on the face of the complaint. Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989). A complaint will not be dismissed for failure to state a claim unless it appears, beyond a doubt, that the plaintiff can prove no set of facts that would entitle them to relief. See Wanamaker v. Columbian Rope Co., 740 F. Supp. 127 (N.D.N.Y. 1990).

B. Plaintiffs' Federal Claims

As previously discussed, Plaintiffs' Complaint must present a viable form of federal jurisdiction. Because Plaintiffs and

Defendants are all citizens of New York, there is no basis for diversity jurisdiction, see 28 U.S.C. @ 1332, and thus the Court's jurisdiction must be predicated on federal question jurisdiction. See 28 U.S.C. @ 1331.

Plaintiffs attempt to implicate four provisions in the United States Constitution: the Constitution's guarantee of a "Republican Form of Government"; the "privileges and immunities" clause of the Fourteenth Amendment; the "equal protection" clause of the Fourteenth Amendment; and the First Amendment. Specifically, Plaintiffs assert that: the New York Farm Act, which provides property tax credits for [**15] agricultural land, violates the Republican Form of Government Clause of Article IV, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment because it "discriminate[s] against plaintiffs and all other non-farmers" (Complaint P 63); the provision of "thousands of 'member item' gifts" by state legislators violates the First Amendment, denies Plaintiffs their right to a republican form of government, and denies Plaintiffs the privileges and immunities of citizenship--although Plaintiffs' do not specifically state in their Complaint how these constitutional provisions are violated; the "taxpayer standing" rule in section 123-b of the State Finance Law violates the First Amendment, denies Plaintiffs their right to a republican form of government, and denies them the privileges and immunities of citizenship because it does not confer standing to challenge a bond issue; the Environmental Bond Act denies Plaintiffs their right to a republican form of government and denies them the privileges and immunities of citizenship because the Bond Act
violates the New York State Constitution; and, finally, New York's procedure for [**16] choosing delegates to its constitutional conventions denies Plaintiffs their right to a republican form of government.

i. Guarantee Clause

Plaintiffs argue that the New York Farm Act, "member item gifts" by state legislators, the State Finance Law, New York's

Environmental Bond Act, and New York's procedure for choosing delegates to its constitutional conventions deny Plaintiffs their right to a republican form of government.

Article IV, section 4 of the United States Constitution provides that the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application [*575] of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, @ 4. Not surprisingly, the Guarantee Clause has been an infrequent subject of litigation. Accordingly, the Supreme Court has warned:

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the [**17] claims presented to be nonjusticiable under the "political question" doctrine.

New York v. U.S., 505 U.S. 144, 184, 112 S. Ct. 2408, 2432, 120 L. Ed. 2d 120 (1992) (citing City of Rome v. United States, 446 U.S. 156, 182, n.17, 100 S. Ct. 1548, 1564, n.17, 64 L. Ed. 2d 119 (1980) (challenge to the preclearance requirements of the Voting Rights Act); Baker v. Carr, 369 U.S. 186, 218-229, 82 S. Ct. 691, 710-716, 7 L. Ed. 2d 663 (1962) (challenge to apportionment of state legislative districts); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 140-151, 32 S. Ct. 224, 227-231, 56 L. Ed. 377 (1912) (challenge to initiative and referendum provisions of state constitution)).

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in Luther v. Borden, 48 U.S. 1, 12 L. Ed. 581 (1849), where the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to

decide what government is the established one in a State." 48 U.S. at 42. Although over the following [**18] century this limited holding transformed into the general rule that "violation of the great guaranty of a republican form of government in States cannot be challenged in the courts," Colegrove v. Green, 328 U.S. 549, 556, 66 S. Ct. 1198, 1201, 90 L. Ed. 1432 (1946) (plurality opinion), this view has not always been accepted. In a group of cases decided before the holding of Luther became a general rule of nonjusticiability, the Supreme Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were non-justiciable. See Kies v. Lowrey, 199 U.S. 233, 239, 26 S. Ct. 27, 29, 50 L. Ed. 167 (1905); Forsyth v. Hammond, 166 U.S. 506, 519, 17 S. Ct. 665, 670, 41 L. Ed. 1095 (1897); In re Duncan, 139 U.S. 449, 461-462, 11 S. Ct. 573, 577, 35 L. Ed. 219 (1891); Minor v. Happersett, 88 U.S. 162, 175-176, 22 L. Ed. 627 (1875).

In New York v. United States, the Supreme Court's most recent exposition on this issue, the Court discussed, but did not resolve, the question of when claims under the Guarantee Clause are justiciable. 505 U.S. at 182-86, 112 S. Ct. at 2432-33. Although the New York Court noted that [**19] since its decision in Luther most courts have concluded that violations of the Guarantee Clause cannot be challenged in the courts because they present nonjusticiable political questions, "not all claims under the Guarantee Clause present nonjusticiable political questions." New York, 505 U.S. at 184-85, 112 S. Ct. At 2433. Nonetheless, the New York Court ultimately found it unnecessary to "resolve this difficult question." 505 U.S. at 184-85, 112 S. Ct. at 2433.

The Second Circuit has been equally reticent in resolving the issue of when the Guarantee Clause presents a nonjusticiable political question. In Padavan v. U.S., 82 F.3d 23 (2d Cir. 1996) the Second Circuit noted that "while it is possible that 'perhaps not all claims under the Guarantee Clause present nonjusticiable political questions,' there is no basis for us to say that the plaintiffs here have presented a justiciable claim." Id. at 28

(addressing whether federal immigration policies deprived New York State of a republican
form of government). Accordingly, this Court is left with scant guidance in determining when the general rule of nonjusticiability should be abrogated.

Furthermore, Plaintiffs [**20] themselves provide little aid in the Court's resolution of this issue; they offer no further explanation of their argument nor do they cite any relevant case law in support of their position. The Court can find few cases where the Guarantee Clause has been invoked to invalidate the actions of a state itself. On the contrary, when the Guarantee Clause is invoked, it is [*576] invariably done so in an effort to challenge an action of the federal government. See, e.g., In re Duncan, 139 U.S. 449, 461, 11 S. Ct. 573, 577, 35 L. Ed. 219 (1891) (addressing rights of states to choose their own government officials and pass their own laws); Bauers v. Heisel, 361 F.2d 581, 588 (3d Cir. 1966) (separate and independent state judiciary); Taylor v. Beckham, 178 U.S. 548, 570-71, 20 S. Ct. 890, 898-99, 44 L. Ed. 1187 (1900) (prescribing the qualifications of state officers); U.S. v. Downey, 195 F. Supp. 581, 585 (S.D.Ill. 1961)(addressing right of state courts to be free of federally imposed rules of criminal procedure).

In light of the Guarantee Clauses' implicit protection of state governmental processes from the tyranny of an all-powerful federal sovereign, it would seem imprudent [**21] on the part of the federal judiciary to allow the Clause to be used to challenge a state's own lawmaking. For example, in 1912, the Supreme Court addressed a challenge to the referendum provisions of the Oregon Constitution. See Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912). Chief Justice White, writing for the majority, found the challenge nonjusticiable and described the claim as follows:

It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an

individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

Pacific States Telephone & Telegraph, 223 U.S. at 150-51, 32 S. Ct. at 231. Such a claim, the Court concluded is "political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress." Pacific States Telephone & Telegraph, [**22] 223 U.S. at 133, 32 S. Ct. at 224. Furthermore, the Tenth Circuit, in addressing the purpose of the Guarantee Clause noted:

In American Constitutional Law @ 5-23, the Guarantee Clause is discussed in the following manner:

The most fundamental threats to state sovereignty--those that genuinely portend reduction of the states into "field offices of the national bureaucracy" or "bureaucratic puppets of the Federal Government"--would seem to arise less from federal laws that impose substantive constraints on state and private actors alike . . . than from federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves. If there is any form of congressional assault that might truly "'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell,'" it is an assault on those democratic processes through [which] citizens . . . retain the power to govern. Kelley v. U.S., 69 F.3d 1503, 1510-11 (10th Cir. 1995), cert. denied sub nom, Kelley v. Department of Justice, 134 L. Ed. 2d 665, 116 S. Ct. 1566 (1996).

Consequently, there is no basis for this Court to [**23] conclude that Plaintiffs have presented a justiciable claim. Thus, Plaintiffs' claims implicating the Guarantee Clause must be dismissed.

ii. Privileges and Immunities Clause

Plaintiffs also argue that the New York Farm Act, "member item gifts" by state legislators, the State Finance Law, and New

York's Environmental Bond Act deny Plaintiffs their privileges and immunities of citizenship.

Article IV, @ 2, cl 1, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The provision was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Paul v. Virginia, (8 Wall.) 168, 180 (1869); see also Toomer v. Witsell, 334 U.S. 385, 395, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460 (1948). As [*577] Justice Bradley remarked in the Slaughter House Case:

The "privileges and immunities" secured by the original constitution, were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the [**24] citizens of other states.

But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.

Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 1 Abb. 388, 15 F. Cas. 649, 652 (C.C.La. 1870) (No. 8408).

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. n1 See Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279-80, 105 S. Ct. 1272, 1276, 84 L. Ed. 2d 205 (1985). Indeed, Charles Pinckney, who drafted the original Privileges and Immunities Clause, stated that it was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M.

Farrand, Records of the Federal Convention of 1787, p. 112 (1911).

----------Footnotes----------

n1 Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States ... shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . .

----------End Footnotes----------

However, the Privileges and Immunities Clause does not infuse citizens with new and independent rights. The Clause "establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." Austin v. New Hampshire, 420 U.S. 656, 660, 95 S. Ct. 1191, 1194, 43 L. Ed. 2d 530 (1975). Justice Miller made this distinction explicit in Bradwell v. State of Illinois, 83 U.S. 130, 138, 21 L. Ed. 442 (1872), where, speaking of the privileges and immunities provision he said that "the protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation." More than fifty years later, Justice Sutherland noted:

This does not mean that a state has unlimited power by law to abridge the privileges of its own citizens. It only means that in such case we must look elsewhere than to the language of the privileges and immunities clause of the Fourth Article of the Constitution for the constitutional infirmity of the statute, if it have any.

Colgate v. Harvey, 296 U.S. 404, 428-29, 56 S. Ct. 252, 258, 80 L. Ed. 299 (1935)

More recently, in Zobel v. Williams, the Supreme Court rejected a challenge to Alaska's dividend scheme, which provided for proportional payments based on length of residency within the state, holding:

The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395, 68 S. Ct. 1156, 1161, 92 L. Ed. 1460 (1948). The Clause is thus not applicable to this case. . . . When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

457 U.S. 55, 59, 102 S. Ct. 2309, 2312, 72 L. Ed. 2d 672 (1982).

Therefore, as citizens of the State of New York challenging the legislative and executive actions of their own state, Plaintiffs have no recourse to the Privileges and Immunities Clause. Accordingly, Plaintiffs' claims implicating the Privileges and Immunities Clause must also be dismissed.

iii. Equal Protection

Plaintiffs argue that the New York Farm Act, which provides property tax credits for agricultural land, violates the Equal Protection Clause of the Fourteenth Amendment because it "discriminate[s] against plaintiffs and all other non-farmers" (Complaint P 63). Essentially, Plaintiffs, who are neither farmers nor owners of agricultural land, assert that their constitutional rights are violated because "the statutory classification is . . . based upon a 'suspect classification,' i.e., political favoritism." (Pltfs' Mem. of Law at 16).

Defendants correctly note that Plaintiffs' burden in pleading that a statute violates the Equal Protection Clause requires more than their pointing out that the statute creates a classification. Indeed, it is the very nature of legislation to classify. See, e.g., Lyng v. Automobile Workers, 485 U.S. 360, 370, 108 S. Ct. 1184, 1192, 99 L. Ed. 2d 380 ("drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one"); Massachusetts Board of [**28] Regents v. Murgia, 427 U.S. 307, 314, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976).

Moreover, tax legislation enjoys the greatest degree of freedom to classify. For example, in Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940), the Supreme Court reasoned:

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the fourteenth amendment was not intended to compel the states to adopt an
iron rule of equal taxation," and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Id. at 87-88, 60 S. Ct. at 408. Accordingly, the Madden Court held that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88, 60 S. Ct. at 408.

Plaintiffs specious argument that New York's Farm Act violates the Equal Protection Clause, because the statutory classification is a "suspect classification," demonstrates Plaintiffs' utter disregard for constitutional jurisprudence on this issue.

The concept of a "suspect classification" saw its genesis in the famous Carolene Products footnote. In United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), the Court wrote that it did not have to inquire "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Carolene Products, 304 U.S. at 152-153 n.4, 58 S. Ct. at 783 n.4.

Here, it is ludicrous to consider non-farmers a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when non-farmers clearly constitute a majority of the electorate. Although courts have at times used an intermediate standard of review for gender-based classifications, see, e.g., Craig v. Boren, 429 U.S. 190, 204, 97 S. Ct. 451, 460, 50 L. Ed. 2d 397 (1976), and occasionally an undefined, but heightened, review standard for classifications based on illegitimacy, see L. Tribe, American Constitutional Law @ 16-23, at 1057 (1978), there are only three suspect classifications: race, alienage, and national origin. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) (recognizing only race, alienage, and national origin as suspect classifications).

[*579] Consequently, Plaintiffs' impassioned attempt to convince this Court that non-farmers are a suspect classification under the Equal Protection Clause necessarily must fail along with the many other classifications that courts havedeemed non-suspect. To illustrate, age is not a suspect classification, see Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-314, 96 S. Ct. 2562, 2566-2567, 49 L. Ed. 2d 520 (1976), classification based on choice of sexual partners is not a suspect classification, [**31] see National Gay Task Force v. Bd. of Educ. of City of Oklahoma City, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985), the classification between prison escapees and other fugitives is not a suspect classification, see Beauchamp v.

Murphy, 37 F.3d 700, 707 (1st Cir. 1994), juvenile delinquency is not a suspect classification, see United States ex rel. Martin v. Strasburg, 513 F. Supp. 691, 706 (S.D.N.Y. 1981), aff'd, 689 F.2d 365, 374 (2d Cir. 1982), rev'd on other grounds sub nom, Schall v. Martin, 467 U.S. 253, 281, 104 S. Ct. 2403, 2418, 81 L. Ed. 2d 207 (1984), students of unaccredited law schools are not a suspect classification, see Lupert v. California State Bar, 761 F.2d 1325, 1328 (9th Cir. 1985), and seamen are not a suspect class. See Jones v. Reagan, 748 F.2d 1331, 1337 (9th Cir. 1984).

It is equally plain that Plaintiffs do not have a fundamental interest in holding on to their tax dollars. Accordingly, "in cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'" Gregory v. Ashcroft, 501 U.S. 452, 470-71, 111 S. Ct. 2395, 2406, 115 L. Ed. 2d 410 (1991) (quoting Murgia, 427 U.S. at 314, 96 S. Ct. at 2567).

Because there is no suspect classification involved, nor any deprivation of fundamental rights, the ordinary equal protection test is extremely deferential: a non-suspect classification is unconstitutional only if no legitimate basis can be found to support it. See, e.g., Harrah Independent School District v. Martin, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979). "Support" means only that a legislature could provide a rational basis for the choice. See, e.g., Vance v. Bradley, 440 U.S. 93, 111, 99 S. Ct. 939, 949, 59 L. Ed. 2d 171 (1979).

Applying this deferential standard to the facts here, the Court can only conclude that the Farm Act is rationally related to a legitimate governmental purpose: the support of farmers and farming through tax relief. (See Defs' Appendix 5; New York Agricultural Statistics 1994-1996 and 1995-1996). Thus, Plaintiffs' cause of action challenging New York's Farm Act is dismissed.

iv. First Amendment

Plaintiffs only remaining federal claim is that defendants Pataki, Finnegan, and Sheffer's advocacy in favor of the Environmental Bond Act violated Plaintiffs' right to "cast an effective vote, the right to a free election, and the right to advance political ideas." (Pltfs' Mem. of Law at 12). In addition, Plaintiffs argue that "those rights were denied by defendants Pataki, Finnegan and Sheffer as they propagandized for the vote and as they actively campaigned for passage of the Bond Act and exhorted the electorate to 'vote yes'." (Pltfs' Mem. of Law at 12).

However, Plaintiffs offer no further explanation of their argument nor do they cite any relevant case law in support of their position. n2 Moreover, the Court can find no precedent for the assertion that a party's political advocacy can affirmatively infringe another's First Amendment right to free speech or a free election. Indeed, to accept this argument, the Court would necessarily be limiting the free speech rights of defendants Pataki, Sheffer, and Finnegan; a position that the First Amendment, and this Court, will not countenance.

----------Footnotes----------

n2 Plaintiffs argument that defendants Pataki, Finnegan, and Sheffer's advocacy violates the New York Constitution and thus the First Amendment is also unavailing. Notwithstanding the fact that it is dubious whether defendants acted in contravention of the New York Constitution, there is simply no basis for the assertion that the federal constitution prohibits individuals, including state actors acting in contravention of a state constitution, from expressing their personal beliefs regarding pending legislation or referenda. Plaintiffs' attempt to "bootstrap" their state law claim into the First Amendment must be rejected.

----------End Footnotes----------

Accordingly, Plaintiffs' First Amendment claims are without merit and must also be dismissed.

C. Plaintiffs' State Law Claims

As noted previously, federal courts are courts of limited jurisdiction. Thus, in order to address Plaintiffs' state law causes of action, a two-fold inquiry must initially be made: (1) whether this Court has the judicial power to decide the state law claim, and (2) assuming such power exists, whether this Court should, in the exercise of its discretion, decline Plaintiffs' invitation to adjudicate the state law claims.

In Osborn v. Bank of the United States, 22 U.S. 738, 6 L. Ed. 204 (1824), Chief Justice Marshal wrote:

When a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that case, although other questions of fact or law may be involved in it.

22 U.S. at 823. Although this concept of pendent jurisdiction was born in the early part of the 19th Century, it has proved a troublesome concept to apply. In United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, [**35] 16 L. Ed. 2d 218 (1976), the Supreme Court formulated the current standard to determine when a district court possesses the judicial power to exercise jurisdiction over a pendant state claim: "The Federal claim must have substance sufficient to confer subject matter jurisdiction on the court [and] the state and federal claims must derive from a common nucleus of operative fact." Gibbs, 383 U.S. at 725, 86 S. Ct. at 1138.

As to the first prong of this standard, in the Second Circuit the test "is whether the federal . . . claim [is] so insubstantial, implausible, or otherwise completely devoid of merit as not to involve a federal controversy." IUE AFL-CIO Pension Fund, 9 F.3d at 1056. As discussed previously, Plaintiffs' claims implicating the Guarantee Clause, Privileges and Immunities Clause, Equal Protection Clause, and First Amendment are completely devoid of merit.

However, the Court need not determine conclusively whether Plaintiffs' claims are so insubstantial as to negate federal jurisdiction because pendent jurisdiction is a matter of judicial discretion. The Court in Gibbs stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726, 86 S. Ct. at 1139. Even before Congress passed the supplemental jurisdiction statute, see 28 U.S.C. @ 1367, courts in this circuit, with rare exception, adhered to the rationale articulated in Gibbs. See Crane Co. v. American Standard, Inc., 603 F.2d 244, 245 (2d Cir. 1979) ("pendent state claims must be dismissed if it later is determined that there never existed a federal claim sufficient to invoke the jurisdiction of the federal court."); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970); Rogers v. Valentine, 426 F.2d 1361 (2d Cir. 1970) (no abuse of discretion to refuse to exercise pendent jurisdiction after dismissal of federal claim).

Under 28 U.S.C. @ 1367, "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. @ 1376(c). Moreover, the Court notes that "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." Gibbs, 383 U.S. at 726; see also Young v. New York City Transit Authority, 903 F.2d 146, 163-64 (2d Cir. 1990). "A district court ought not 'reach out for . . . issues, thereby depriving state courts of opportunities to develop and apply state law.'" Young, 903 F.2d at 164 (quoting Mayer v. Oil Field Systems Corp., 803 F.2d 749, 757 (2d Cir. 1986)).

Furthermore, exercising supplemental jurisdiction over claims based on the New York Constitution "would violate fundamental principles of federalism and comity" because "New York State has a definite interest in determining whether its own laws comport with the New York Constitution." Young, 903 F.2d at 163-64; see also 28 U.S.C. @ 1367(c)(1) (district courts may

decline to exercise supplemental jurisdiction if "the claim raises a novel or complex issue of State law").

Therefore, in light of the dismissal of all federal claims in this action, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.

III. CONCLUSION

It is therefore ORDERED, that Plaintiffs' Complaint is DISMISSED in its entirety. Plaintiffs' federal claims are dismissed with prejudice.

Plaintiffs' state law claims are dismissed without prejudice.

IT IS SO ORDERED.

April 12, 1997
Binghamton, New York

HON. THOMAS J. McAVOY

Chief U.S. District Judge